

MISSISSIPPI LAW JOURNAL



WORK OF THE MISSISSIPPI SUPREME COURT FOR
SEPTEMBER 1940, AND MARCH 1941, TERMS

"WHERE THERE IS A WILL THERE IS A . . ." BURDEN OF PROOF;
OR WAS CORNELIUS SHEEHAN UNDULY INFLUENCED?

L. A. Smith, Sr.

LANDS OF THE LIQUIDATING LEVEE BOARD THROUGH
LITIGATION AND LEGISLATION

John William Wade

THE HUMOR OF JOHN SHARP WILLIAMS

George C. Osborn

November, 1941

VOLUME XIV

NUMBER 1

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Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

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Contents

THE WORK OF THE MISSISSIPPI SUPREME COURT FOR THE SEPTEMBER 1940, AND MARCH 1941, TERMS

I. APPEAL AND ERROR.....	<i>Charles R. Galloway</i>	1
II. COMMERCIAL LAW.....	<i>Kermit R. Cofer</i>	11
III. CRIMINAL LAW.....	<i>L. A. Smith, Jr.</i>	21
IV. INSURANCE.....	<i>George T. McClintock</i>	32
V. PLEADING, PRACTICE AND PROCEDURE.....	<i>John M. Kuykendall</i>	37
VI. PROPERTY.....	<i>Warner Beard, Jr.</i>	49
VII. PUBLIC LAW.....	<i>Pat D. Holcomb</i>	58
VIII. TAXATION.....	<i>Marvin Williams</i>	75
IX. TORTS.....	<i>Maxwell Bramlette</i>	82
X. STATISTICAL SURVEY.....	<i>Richard Lord</i>	98

MISSISSIPPI LEADING CASES

WHERE THERE IS A WILL THERE IS A . . . " BURDEN OF PROOF; OR WAS CORNELIUS SHEEHAN UNDULY INFLUENCED?.....	<i>L. A. Smith, Sr.</i>	103
---	-------------------------	-----

MISSISSIPPI LEGAL HISTORY

LANDS OF THE LIQUIDATING LEVEE BOARD THROUGH LITIGATION AND LEGISLATION.....	<i>John William Wade</i>	114
---	--------------------------	-----

BIOGRAPHICAL SKETCHES

THE HUMOR OF JOHN SHARP WILLIAMS.....	<i>George C. Osborn</i>	145
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Both speakers have had considerable practical experience in the field and are well qualified to present their subjects. The lectures have been prepared with a view to meeting the problems which the ordinary practitioner meets in his everyday practice. The Law School feels that the purpose of this Institute is not to attempt to evaluate the desirability of the further expansion of administrative law or the creation of new administrative tribunals but to provide for practicing lawyers the legal information they need for efficient practice in connection with existing tribunals and laws.

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THE WORK OF THE MISSISSIPPI SUPREME COURT FOR THE SEPTEMBER 1940, AND THE MARCH 1941, TERMS

I.

APPEAL AND ERROR

*Charles R. Galloway**

A. WHAT DECISIONS ARE REVIEWABLE

In three cases the Supreme Court held that no appeal lay from the decree complained of. The first of these, the case of *McManus v. Craig, State Tax Collector*,¹ was a suit by the State Tax Collector against the Chancery Clerk of Harrison County and the surety on his official bond, seeking to recover sums which the clerk had allegedly failed to collect from persons redeeming lands. The bill set out the duties of the clerk in regard to the collection of such sums, and recited the failure to make such collections, as revealed by an investigation of the records of Harrison County. To this bill was interposed a general demurrer by each of the defendants, reciting merely that the bill wholly failed to state a cause of action against the defendants, and that there was no equity on the face of the bill. No particular allegations were made, and no special demurrers filed. The chancellor overruled each of the demurrers, and granted an appeal to settle the principles of the case. The court held that a consideration of the bill and the general demurrers indicated that all of the controlling principles of the case could not be settled on this appeal on the record before them, and that the appeal would therefore be dismissed.

In *Craig, State Tax Collector v. Barber Brothers Contracting Co.*,² the State Tax Collector had filed an affidavit for attachment against the defendant, a foreign corporation, and had suggested in the affidavit the names of certain garnishees believed to have in their possession money and effects of the non-resident defendant. A writ of attachment was issued, and the following day process was served on the garnishees, and return noted on the writ of attachment. The garnishees obtained a hear-

*Member of Mississippi and Harrison County Bars; Gulfport, Mississippi.

¹190 Miss. 1, 198 So. 559 (1940).

²190 Miss. 182, 199 So. 270 (1940).

ing on motion to dismiss the attachment and quash the garnishment, which resulted in an order vacating the writs of garnishment and dismissing the garnishees but not affecting the attachment. The return of the sheriff as to the attachment was made four days after appeal was taken from the above order. The court held in a four to two decision that the quashing of the writs of garnishment was not such a final judgment as would permit an appeal under Section 13, Mississippi Code of 1930, permitting an appeal from any final judgment, for the reason that the suit for attachment, which was a part of the same proceeding, was still pending. The court further ruled that Section 168, Mississippi Code of 1930, regulating appeals from orders discharging attachments, did not apply to a judgment which quashed a writ of garnishment but which left the attachment suit filed as a part thereof still pending. The decision was based on the rule that all appeals are statutory and that no statute authorized an appeal in such a situation.

The dissenting opinion of two justices was based on a more liberal view of Section 168, construing the section to be intended to grant an appeal either from an attachment or a garnishment on the ground that garnishment is a form of attachment.

In a very short opinion in the case of *N. W. Newell & Co. v. Bucyrus-Erie Co.*,³ the court held that where a bill was filed against two defendants, and one demurred and moved to quash, and the other failed to answer, and the chancery court overruled the demurrer and motion, but entered no decree *pro confesso* against the second defendant, no interlocutory appeal from the order overruling the demurrer and motion would be entertained.⁴

The case of *State ex rel. Whall v. Saenger Theatres Corp.*,⁵ was a suit filed by an individual in the name of the state under Chapter 341, Mississippi Laws of 1938 to abate as a public nuisance the practice of "Bank Nite" and to recover the amount of admissions paid by complainant and others. Demurrers were filed and sustained, and the complainant, declining to amend, filed this appeal in the Supreme Court. Some time after the appeal was taken, affidavits were filed by the managers of defendant's two shows in Gulfport and the managers of two shows in Biloxi, to the effect that no form of bank night had been conducted in their theatres during the past three months. Affidavits to the same effect were filed

³199 So. 307 (Miss. 1940).

⁴The following cases were cited by the court as authority: *Mirtz v. Gordon*, 175 Miss. 76, 168 So. 74 (1936); *Federal Land Bank v. Kimbriel*, 174 Miss. 153, 163 So. 501 (1935); *Liberty Trust Co. v. Planter's Bank*, 155 Miss. 721, 124 So. 341 (1929).

⁵190 Miss. 391, 200 So. 442 (1941).

also by the mayors of the two cities. The defendant then moved in the Supreme Court to dismiss the appeal as moot. The court held that it was a matter of discretion as to whether an injunction against a public nuisance would issue after the defendant had ceased the objectionable practice but that in the present case the affidavits gave no indication of the future policy of defendant as to the operation of bank night. Further, the affidavits did not recite whether or not bank night was in operation in defendant's theatres in other cities within the jurisdiction of the court. The question was therefore held not to be moot.

In *Supreme Instruments Corp. v. Lehr*,⁶ the court upheld its right to review the verdict of the jury to, "guard against any misapplication of substantive principals in those cases where the admitted facts do not justify their invocation." In this case the plaintiff tripped and fell as she was leaving a rest room operated by the defendant, which was about a foot and a half above the level of the main floor and was connected thereto by one step. There had been a jury verdict for plaintiff in the lower court. The court reviewed the evidence in great detail, particularly as regards the construction of the step, and came to the conclusion that the step and the lighting of same were reasonably safe for one exercising reasonable care in the use thereof and that the preemptory instruction requested by the defendant in the trial court should have been sustained. This case was heard on suggestion of error; the suggestion being sustained, and the former decision reversed.⁷

B. THE RECORD ON APPEAL

The court had before it, during the 1940-41 term, one case involving a judgment void on its face, two cases involving appeal bonds, one case involving notice to the court reporter to transcribe his notes, and one question as to what constituted the record.

In *Gardner v. Cade*,⁸ plaintiff brought action in the justice of the peace court for the conversion of two cows. There was judgment for the plaintiff by default, rendered on March 11, 1939. An appeal bond was thereafter filed by defendants, which was dated April —, 1939. The transcript of the proceedings was certified to the circuit court on August 12, 1939, and there was again a judgment by default against the defendants. Defendants, at the same term, appeared and moved for a new trial, alleging that they had no notice of the filing of the record in the circuit court. From an adverse ruling, they appealed to the Supreme

⁶190 Miss. 600, 1 So. (2d) 242 (1941).

⁷The former decision is reported at 190 Miss. 600, 199 So. 294 (1940), no question of Appeal and Error being there involved.

⁸190 Miss. 505, 200 So. 720 (1941).

Court. In the Supreme Court the plaintiff raised for the first time the question of the validity of the appeal to the circuit court. It was held that the record itself showed that at least twenty-one days had elapsed between the judgment and the filing of the appeal bond and that the appeal to the circuit court and the subsequent proceedings were therefore void. The court then held that it would not affirm a void judgment, even when no objection was made in the lower court; for the reason that, the judgment being void, there was nothing to affirm.

The case of *Sabougla Drainage District No. 2 v. People's Bank & Trust Co. of Tupelo*⁹ was an appeal by the district which was filed without an appeal bond and at a time later than that required by section 2323, Mississippi Code of 1930. Appellee moved to dismiss the appeal on the grounds: First, that no appeal bond had been filed; and, second, that the appeal was not taken within the time required by law. The court, while holding that a drainage district is not such a branch of the government as to come within Chapter 356, Mississippi Laws of 1938 providing for appeals without bonds by certain governmental groups, nevertheless recognized that appeals had been theretofore taken by drainage districts without bond, their right to so appeal having never before been challenged, and exercised its discretion to permit bond to be executed within ten days.

As to the delay in perfecting the appeal, the court found that the decree in the lower court had granted the appeal and, further, that a petition for appeal had been filed reciting that no bond was required. It also appeared that counsel on both sides had from time to time held conferences with the clerk and the official stenographer in regard to the transcript. The return day of the appeal was the first Monday in January, whereas the record was filed in the Supreme Court on February 20th. The court held that there was an effort in good faith to have the record filed with the clerk of the Supreme Court, that there was only a short delay in filing it, and that the rights of opposing party had not been prejudiced by the delay. It was held that the court had discretion under Section 3382, Mississippi Code of 1930 to hear the case on its merits under such circumstances and that the court, under the facts outlined, would permit bond to be filed and would hear the case.

*Kiersky v. Hyman Mercantile Co.*¹⁰ was an action by two stockholders, owning approximately one fourth of the stock of defendant corporation, who alleged that the company was being mismanaged by the majority stockholders, who were unfriendly to the complainants, in such a way that the value of the stock would soon be destroyed. The trial court

⁹1 So. (2d) 219 (Miss. 1941).

¹⁰198 So. 574 (Miss. 1940).

found for the complainants, appointing a receiver for the company and ordering him to sell the assets of the company and to pay the complainants their proportionate part of the funds realized. Defendants demanded an appeal with supersedeas, and bond was fixed at double the amount of the capital stock of the corporation. On motion by defendants to be allowed a more reasonable bond, the Supreme Court held a proper bond would be one-fourth of the total assets of the corporation as shown by the evidence; for the reason that if the total interest of complainants is protected by bond, the requirement of the law is satisfied. In so holding, the court resorted to Section 35, Mississippi Code of 1930, providing that bond may be fixed as to amount according to the discretion of the court in cases of supersedeas not provided for by any direct statute. Section 29, Mississippi Code of 1930 contended for by the complainants was held to apply only if the complainants had claimed the entire property and had obtained a decree for same.

The requirements for giving notice to the court reporter to transcribe his notes was involved in *Redmond v. Hilliard*.¹¹ In the first hearing before the Supreme Court the appellee filed a motion to strike the transcript of the court reporter's notes from the record on the ground that the reporter had not been given notice to transcribe his notes as required by Chapter 236, Mississippi Laws of 1936. The appellant filed a carbon copy of a letter to the court reporter in his answer to the motion, asserting that the notice had been given, and asked for *certiorari* requiring the clerk to send up the docket entries, including the written notice to the reporter. There was no allegation as to when and how the notice was filed. The court allowed the *certiorari* and passed the motion to strike until the documents requested were sent up.

On the second hearing the following facts appeared: The chancellor had announced orally on March 25, 1940, that he would overrule appellant's motion for a new trial, and on that day appellant served the reporter with notice to transcribe his notes. On May 22, 1940, the order overruling the motion for the new trial was entered. No copy of the notice to the reporter was filed with the clerk. It was held that the notice given prior to the entry of the order overruling the motion for a new trial, but after the chancellor had orally announced that he would overrule the motion, was sufficient, and, further, that the notice having actually been given to the reporter, the copy could be filed with the clerk after appeal was perfected to the Supreme Court.

¹¹First hearing is reported in 190 Miss. 839, 199 So. 83 (1940); second hearing is reported in 190 Miss. 839, 845, 200 So. 130 (1941).

In the above opinion, the case of *Mayflower Mills v. Breeland*¹² was distinguished on two points. First, in the *Breeland* case the notice was given to the reporter before the trial judge had made any announcement whatsoever as to his ruling; and, second, the appellant in that case had given notice to the reporter to transcribe his notes "if and when the circuit judge overrules the motion for a new trial filed in the case."

Appellee, in *Redmond v. Hilliard*,¹³ also objected on the ground that the appeal bond had not been filed within the time required by law. The final judgment had been rendered in September of 1938, and the motion for a new trial had been passed for a vacation hearing. No order was entered until May 22, 1940, and bond for appeal was filed on that day. It was held that the appeal did not lie until the motion for a new trial was overruled and that bond given on that day was sufficient.

In the case of *Lee v. State*¹⁴ after a trial in a justice of the peace court and on appeal to the circuit court, a certified transcript of the proceedings was sent up and filed. This transcript was not produced in evidence by the state on the trial in the circuit court. Appellant objected on appeal to the Supreme Court on two grounds: First, the circuit court did not obtain jurisdiction of the cause; and, second, the transcript did not become a part of the record on appeal to the Supreme Court. The court held that a filing of the transcript of proceedings conferred jurisdiction on the circuit court, that it was unnecessary to introduce the transcript in evidence, and, further, that when the transcript was filed, it became a part of the record on appeal without the necessity of introducing it in evidence in the trial in the circuit court, following the opinion in *Myrick v. Mansell*.¹⁵

C. DISPOSITION

*Ravesies v. Martin*¹⁶ is an interesting case from the standpoint of venue as well as of appeal and error. Appellant filed suit in Forrest County seeking to cancel a deed of trust as a cloud on his title to certain lots lying in Forrest County and in Jasper County. In the deraignment of title it appeared that all of the land in Forrest County had been sold to the state for taxes and that title had matured in the state. Therefore, neither of the parties had any interest in the land in that county. Appellees demurred on the ground that the suit was not filed in a county in which the land or a part thereof was located. The case proceeded to trial on the merits; and, at the conclusion of the testimony of appellant, the appellees

¹²168 Miss. 207, 149 So. 787 (1933).

¹³190 Miss. 839, 199 So. 83, 200 So. 130 (1940, 1941).

¹⁴190 Miss. 877, 1 So. (2d) 492 (1941).

¹⁵184 Miss. 701, 184 So. 447, 185 So. 581 (1938, 1939).

¹⁶190 Miss. 92, 199 So. 282 (1940).

moved to dismiss the suit on the ground that the court was without territorial jurisdiction and that the proof failed to sustain the allegations of the bill of complaint. The chancellor sustained the motion, the decree reciting that the bill was dismissed because the proof on the whole case failed to sustain the allegations of the bill of complaint. Appellants filed an appeal, claiming, among other matters, that the trial court was without jurisdiction to try the case. Appellees did not raise the question of venue in the Supreme Court. It was held that the action in the court below was a suit *in personam*, no process being sought directly against the land and the court not being asked to make any disposition thereof, and that, as a result, the fact that the suit was brought in a county in which no land was located was a matter of venue and not of jurisdiction. The appellees, having failed to raise the point on appeal, had waived their right to object to the venue, and the appellants were not entitled to seek a reversal on that ground after having themselves brought the suit in Forrest County and having insisted throughout the trial on their right to have the suit heard there.

In *Hartford Accident & Indemnity Co. v. Hewes*,¹⁷ it was held on suggestion of error that where a demurrer to a declaration in the lower court was wrongfully overruled the Supreme Court should have reversed and remanded the case, giving the plaintiffs below a chance to amend their declaration, and that the court's former action¹⁸ in reversing and rendering the case should be modified. The court added that it was not necessary that the sufficiency of the proposed amendment be exhibited to the Supreme Court.

A short opinion in *Gibson v. State*¹⁹ held that where there was no reversible error in the instructions when all were read together, and the evidence was sufficient to sustain the verdict, and there was no reversible error in any of the other assignments, the judgment would be affirmed.

In *United Gas Corp. v. Leggett*,²⁰ the court required a remittitur from \$600.00 to \$125.00. The opinion consisted merely of the citation of *Vicksburg Waterworks Co. v. Dutton*.²¹ In that case the reason given for the remittitur was that the amount awarded was so excessive as to evince passion or prejudice on the part of the jury.

The decision in the case of *Malouf v. Gully, State Tax Collector*²² can best be summarized by quoting the headnote, as follows:

¹⁷190 Miss. 225, 199 So. 772 (1941).

¹⁸For the former decision see *Hartford Accident & Indemnity Co. v. Hewes*, 190 Miss. 225, 241, 199 So. 93 (1940).

¹⁹199 So. 76 (Miss. 1941).

²⁰198 So. 763 (Miss. 1940).

²¹198 Miss. 209, 53 So. 537 (1910).

²²1 So. (2d) 230 (Miss. 1941).

"Where appellant's case depended largely if not entirely on the truth of his testimony as a witness in his own behalf, and chancellor not only heard his testimony but observed his appearance and manner of testifying, decree would be affirmed on ground that evidence though circumstantial sustained decree."

D. MISCELLANEOUS

In *Evans v. Hardin*²³ suit was brought by attorneys for fees allegedly due under a contract for legal services. Plaintiffs had been employed on a percentage basis to recover from a bank certain land and an insurance policy, held as security for a debt. They succeeded in having the debt claimed by the bank declared usurious, whereupon the security was recovered.²⁴ At the time of the original suit the security had been foreclosed by the bank; and when suit was filed to recover the security, the bank filed a crossbill claiming \$10,916.77 as a balance due under the deed of trust. As a result of the decision that the debt was usurious and void, the bank failed in its claim for the balance allegedly due. Thereupon, plaintiffs in the present suit claimed one-fourth of the property and the insurance policy recovered and also one-fourth of the \$10,916.77, which the bank failed to get. On a former trial the Supreme Court held that plaintiffs were not entitled to both one-fourth of the property recovered and one-fourth of the indebtedness claimed by the bank.²⁵ On the present hearing on suggestion of error plaintiffs claim that they are entitled to elect whether they shall take one-fourth of the property or one-fourth of the claim the bank failed to sustain.

It was held that plaintiffs had until this hearing asserted their claim to one-fourth of the property. Further, the lower court had ordered a partition of said property in which action plaintiffs had acquiesced and from which action no appeal had been taken. Having so contended for and acquiesced in the action of the lower court in awarding them one-fourth of the property recovered, they cannot be heard to claim instead a money decree against defendants for one-fourth of the amount of the balance of indebtedness the bank had unsuccessfully tried to collect.

In *Sadler v. Glenn*²⁶ appellant asserted as error the finding of fact made by an attorney appointed by the chancellor as master. It was held that the finding of fact by the master had the force and effect of a jury verdict. And, his findings having been approved by the chancellor, the Supreme Court was unable to say that they were wrong on the facts.

²³190 Miss. 299, 306, 200 So. 125 (1941).

²⁴*Hardin v. Grenada Bank*, 182 Miss. 689, 180 So. 805 (1938).

²⁵190 Miss. 229, 199 So. 308 (Miss. 1941), no question of appeal and error being there involved.

²⁶190 Miss. 112, 199 So. 305 (1940).

In *Tatum v. Sciscoe*,²⁷ an affidavit in replevin was filed by appellee to recover certain property alleged to have been wrongfully detained by the appellant. From a judgment for the plaintiff, appellant filed this appeal, raising for the first time the claim that the affidavit in replevin was insufficient. The court found that the affidavit filed had been made by an attorney in behalf of the appellee and that the affidavit recited that the property claimed was the property of "affiant" instead of the property of the appellee. The court said that under Section 3079, Mississippi Code of 1930 it was indispensable that there be an affidavit averring that the person seeking to recover the property was entitled to immediate possession of same and that such an affidavit was a condition precedent to the issuance of a valid writ of replevin. The court further found that the affidavit exhibited was insufficient and that the lower court did not therefore have jurisdiction to try the suit. The court added that under such circumstances the invalidity of the affidavit might be raised for the first time in the Supreme Court.

From a practical standpoint one of the most interesting cases handed down by the Supreme Court during the last term was the case of *Life & Casualty Ins. Co. v. Walters*.²⁸ Section 571, Mississippi Code of 1871, provided that a resident of this state might institute suit without pre-paying costs or giving security therefor by suing *in forma pauperis*.²⁹ Thereafter, during the year 1879, the case of *Woods v. Davidson*³⁰ was decided, holding that the cited section did not permit the taking of an appeal on pauper's affidavit in lieu of filing appeal bond but that such proceeding applied only to the court in which suit was commenced. On November 14, 1904, the Supreme Court promulgated its Rule 30³¹ as follows:

"When costs are awarded in this court against the appellee, and there shall have been a return of *nulla bona* to an execution against him, and the costs shall be paid by appellant, no mandate shall issue upon the application of the appellee, until he shall pay into the Court, for the use of appellant, the costs paid by him."³²

In 1933 the first attempt was made to obtain a mandate after payment of costs by appellant by filing a pauper's affidavit instead of paying costs as required by the rule above quoted.³³ The motion was denied, but this was without a written opinion.

²⁷189 Miss. 803, 199 So. 70 (1940).

²⁸190 Miss. 761, 771, 200 So. 732 (1941).

²⁹MISS. CODE ANN. (1930) §663 is substantially the same.

³⁰57 Miss. 206 (1897).

³¹83 Miss. at p. XXVII.

³²This rule is still in force as Rule 29 of the Revised Rules of 1918. See 161 Miss. at 907.

³³*DuBois v. Thomas*, #27833. No report of this hearing has been made, but it is mentioned in *DuBois v. Thomas*, 173 Miss. 697, 161 So. 868 (1935).

In 1939, in the case of *Jackson County v. Meant*,³⁴ the Supreme Court reversed its practice and held that the mandate might be sent down upon the filing of a pauper's affidavit by appellee without the payment of costs as required by the rule.

In the *Walters* case plaintiff had obtained a judgment in the lower court which had been reversed in the Supreme Court on November 29, 1937.³⁵ Appellee, plaintiff below, had sued in the lower court on a pauper's affidavit and did not pay the costs in the Supreme Court when the judgment was reversed. On March 16, 1938, the costs were paid by appellant. On December 28, 1939, soon after the publication of the *Meant* case, appellee in the *Walters* case filed a motion to send down the mandate without the payment of costs, and the mandate was accordingly sent down. Plaintiff again obtained a judgment in the lower court, which was again reversed on November 25, 1940.³⁶ Appellee then filed another motion to send down the mandate and with it another pauper's affidavit. This hearing was held on that motion.³⁷

Appellant, after setting out the facts, pleaded that in such a circumstance it would be better to pay the amount demanded in the first instance than be forced to pay costs time and again because of errors committed by appellee in the lower court and that it was extremely likely that to win such a case would cost more than to lose at the beginning. The Supreme Court acknowledged error in the decision of the *Meant* case and overruled the majority opinion therein, adopting the minority opinion that the statute dealing with suits *in forma pauperis* applies only to courts of original jurisdiction and not to courts of appeal.

³⁴185 Miss. 235, 189 So. 819 (1939).

³⁵*Life & Casualty Insurance Co. v. Walters*, 180 Miss. 384, 177 So. 47 (1937).

³⁶*Life & Casualty Insurance Co. v. Walters*, 190 Miss. 761, 198 So. 746 (1940).

³⁷*Life & Casualty Insurance Co. v. Walters*, 190 Miss. 761, 771, 200 So. 732 (1941), cited *supra* note 28 & 36.

II.

COMMERCIAL LAW

*Kermit R. Cofer**

A. BILLS AND NOTES

(1) Usury

In *Crabb v. Comer*¹ appellee had been an agent of the Meridian Fertilizer Factory to sell fertilizer according to a schedule of prices provided him, one carrying cash prices and another providing credit prices on an average of 10% higher than the cash prices. In accordance with this agency the factory sent to him certain fertilizer. Appellee, instead of selling all the fertilizer so sent him, used part of it himself and did not remit to his principal for any of the fertilizer he used nor did he pay all of the amount he had received from sales of the other portion. When the factory became insistent about payment, it was agreed between the parties that appellee would execute a note to the principal payable on a subsequent date, and that the value of the fertilizer not paid for, including what appellee had sold, would be calculated at credit prices and made the principal of the note. The note, when executed, provided for interest after maturity and was secured by a deed of trust. When default was made, the trustee in the deed of trust brought suit to reform and foreclose. Appellee defended on the ground of usury. The court held that "the only way in which legitimacy may be given to the transaction on appellee's part as regards the fertilizers used by him is that he shall be held to have elected or agreed, in force of his conduct, to pay the cash price at the end of the month or else to pay the credit price of 10 per cent. additional." The court further held that there was no usury as to the sums for the fertilizer appellee used, but that there was usury in the charges for the sums he had collected from sales to others and failed to remit to the principal.

(2) Rights of Accommodation Maker

In *Prince v. Prince*² the court held that when appellant had made payments on a note on which he was accommodation maker for appellee, appellee became obligated to reimburse him therefor.

*Member Mississippi and Yalobusha County Bars; Water Valley, Mississippi.

¹190 Miss. 289, 200 So. 133 (1941).

²190 Miss. 309, 200 So. 136 (1941).

(3) Extension of Time for Payment

In *Hattiesburg Production Credit Association v. Smith*³ the court held that where there was no consideration therefor, an agreement to extend time of payment of a past due obligation is not binding on the creditor, and that it amounts to no more than indefinite indulgence, and a part payment of the debt amounts to no consideration for an extension of time.

(4) Proof

In *Peebles v. Miles*⁴ the Supreme Court held that where part of the note sued on became lost and the fact of its loss was not shown to have been discovered until during the trial of the cause in the county court, procedure to substitute the lost part was governed by Section 2337, Mississippi Code of 1930, and that appellant was entitled to no notice.

B. CONTRACTS

(1) Private Contracts

(a) Deeds

In *Federal Land Bank of New Orleans v. Cooper*⁵ the Supreme Court distinguished between an exception and a reservation in a conveyance as follows:

"An exception excludes some part of the thing from the conveyance and the title to that part remains in the grantor by virtue of his original title, while a reservation creates a new right out of the subject of the grant and is originated by the conveyance."

It went further to lay down seven requirements as to valid exceptions as follows:

"1. The exception must be by apt words. 2. It must be a part of the thing granted, and not of some other thing. 3. It must be a part of the thing only, and not of all, the greater part, or the effect of the thing granted. 4. It must be of such a thing as is severable from the thing which is granted, and not of an inseparable incident. 5. It must be of such a thing as he that doth except may have, and doth properly belong to him. 6. It must be a particular thing, out of a general, and not of a particular thing, or a part of a certainty. 7. It must be certainly described and set down."⁶

³1 So. (2d) 768 (Miss. 1941).

⁴189 Miss. 623, 198 So. 29 (1940).

⁵190 Miss. 490, 500, 200 So. 729, 730 (1941).

⁶Federal Land Bank of New Orleans v. Cooper, 190 Miss. 490, 500, 200 So. 729, 730 (1941).

As complying with the definition and requirements of a good exception, the court held valid an exception in a deed by appellant to one of appellees in these words, "One-half interest in all minerals is reserved to the Grantor."

(b) *Limitation of Actions—Implied Promise*

In *Prince v. Prince*⁷ the court held that the three-year statute of limitations is applicable to suit by an accommodation maker of a note against the person accommodated for payments on a promissory note by the accommodation maker, and not the six year statute, holding that the implied promise, in order to come within the six year statute, must be to perform a contract, the terms of which are written, and that the payments made by the accommodation maker in the case from which arose the implied promise were not provable by any writing, but rested in parol.

(c) *Attorney Fees*

In *Evans v. Hardin*⁸ appellants had entered into a contract with appellees whereby appellants, as attorneys for appellees, were to seek recovery of property from a bank and a cancellation of an indebtedness allegedly owing to the bank by the appellees, for which a cash retainer was paid; and it was agreed by appellees to pay 25% of amount received from the bank, "whether it be land, or personalty, or money, or credit on indebtedness." A suit was instituted⁹, resulting in recovery for appellees of an insurance policy and the land involved in the suit, the court determining that the debt for which the policy and the land were held as security and for which the land involved had been sold by foreclosure had been paid in usurious interest collected by the bank.

Appellants brought suit to recover one-fourth of the insurance policy, one-fourth of the amount of the debt cancelled, and one-fourth of the land. The Supreme Court held that the land sale was set aside and the land restored to the appellees in this suit because under the decision there was no debt against the land. Hence, under the contract the appellants were entitled to the contractual portion of the policy and of the land, but they were not entitled to a personal decree for a fourth of the debt cancelled.

⁷190 Miss. 309, 200 So. 126 (1941).

⁸190 Miss. 299, 199 So. 308 (1940).

⁹*Hardin v. Grenada Bank*, 182 Miss. 689, 180 So. 805 (1938).

(2) Public Contracts

(a) Highway Contracts

(1) *Rights of Beneficiaries.* In *Hartford Accident & Indemnity Co. v. Hemet*¹⁰ appellees as insurance agencies had sold to a subcontractor public and employees' liability insurance. Appellant had become surety on the subcontractor's performance bond. The suit was brought against the subcontractor and appellant, as its surety, by the appellees to collect the amount of premiums unpaid on the liability insurance. The Supreme Court held that one not a party to a contract can sue for a breach thereof only when the condition which is alleged to have been broken was placed in the contract for his direct benefit, and that a mere incidental beneficiary, as the court determined appellees were, acquires no right, by virtue of the contractual obligation, against the promisor or the promisee. Hence recovery against appellant was denied.

(2) *Contractor and Subcontractor.* In *Arkansas Fuel Oil Co. v. Trinidad Asphalt Mfg. Co.*¹¹ appellee was the original contractor for the construction of a federal aid highway, and one Russell became a subcontractor therefor. The highway to be constructed was a state highway. During the performance of Russell's work, he purchased tires, tubes, and gasoline from appellant, which were used in the performance of his work under the contract. Appellant sued appellee for the price of these supplies. The Supreme Court said:

"The statutes applicable to contracts of the kind here in question, and particularly Section 5009, Code 1930, impose liability upon the original contractor to pay all persons who furnish labor, material, equipment or supplies for, and in the course of, the performance of the contract, and this includes material and supplies furnished to a subcontractor, as this court has several times held."¹²

(b) Teacher's Contracts

In *Morris v. Robertson, County Superintendent of Education*¹³ appellant began teaching school for the year 1939-40 under an agreement with the predecessor in title of appellee whereby appellant would be paid \$120 per month as salary, and if finances would permit it, an increase would be paid him. In December, 1939, the then superintendent of education had issued to appellant a pay certificate for \$156.24 as an increase in his salary

¹⁰190 Miss. 225, 199 So. 93 (1940).

¹¹189 Miss. 366, 198 So. 41 (1940).

¹²*Arkansas Fuel Oil Company v. Trinidad Asphalt Mfg. Co.*, 189 Miss. 366, 369, 198 So. 41 (1940).

¹³189 Miss. 592, 198 So. 290 (1940).

for the previous months of the school term. When appellant's January, 1940, salary became payable, appellee refused to issue a certificate for it, taking the position that the \$156.24 had been illegally paid to him and contending that it constituted more than payment to him for the month of January, 1940. Suit was begun for mandamus. The Supreme Court held that the agreement to increase the salary was not valid and not enforceable against the county because it rested in parol and that it was void for uncertainty because the amount of the extra compensation to be paid was not agreed upon before the services were rendered.

C. CORPORATIONS

(1) Ultra Vires

In *Federal Land Bank v. Cooper*¹⁴ appellees, complainants in the court below, brought suit against appellant to cancel an exception in a deed by appellant to one of appellees providing, "One-half interest in all minerals is reserved to the Grantor." Appellees claimed that appellant had no authority to withhold mineral rights in lands it sold, that such acts are *ultra vires*. The Supreme Court reannounced the law that the question of *ultra vires* acts of corporations in buying and holding land can only be raised by the state in which the land is situated or the sovereignty from which the corporate charter came.

(2) Liability to Taxes

In *Craig, State Tax Collector, v. Brown & Williamson Tobacco Corp.*¹⁵ which was a suit by appellant to collect privilege taxes from appellee as a transient vendor, the court held that Section 221, Chapter 120, Mississippi Laws of 1940, applies only to natural persons and not to corporations, since a corporation "cannot itself actually peddle goods."

(3) Doing Business in Mississippi

Three decisions were added during the year to the rapidly increasing number devoted to the determination of whether certain acts of foreign corporations constitute doing business in Mississippi within the condemnation of Section 4140, Mississippi Code of 1930. These decisions all upheld the doing of the acts complained of and are important in shedding further light upon what constitutes doing business within the meaning of the Section.

In *Yellow Mfg. Acceptance Corp. v. American Oil Co.*¹⁶ appellant was domiciled in another state where it was engaged in the purchase of

¹⁴190 Miss. 490, 200 So. 729 (1941).

¹⁵190 Miss. 360, 200 So. 446 (1941).

¹⁶2 So. (2d) 834 (Miss. 1941).

installment contracts. In line with its corporate purpose it bought from one Pearce, an automobile dealer in Mississippi, a number of such contracts for automobiles sold by Pearce. Subsequently six automobiles were repossessed under the contracts, due to default in payments, and were left with Pearce. Appellant contended they were left for storage only. Appellee produced evidence tending to show they were left for sale by Pearce, subject to approval of the Acceptance Corporation. The court said that appellant was not doing business in Mississippi, and observed that the action of appellant in undertaking through Pearce to dispose of the repossessed cars "was a mere incident to the original purchase and acquisition of the contracts. It was a step toward realizing on the contracts and closing up the matter. In other words, the character of the original transaction, by means of which the Acceptance Corporation acquired the contracts, colored everything done thereafter toward enforcing them. Again, in different language, they were foreign contracts to begin with, and continued so to the end, notwithstanding that in order to enforce them it was necessary to resort to local action."

In *Morrison v. Guaranty Mortgage and Trust Co.*¹⁷ the Supreme Court held that where a foreign corporation contracted with people in Mississippi, called local correspondents, to forward to it applications for loans to be secured by farm property in Mississippi, the local correspondents not being obligated to send to the corporation such contracts and the corporation not being obligated to accept them when they were forwarded to it, the corporation was not engaged in intrastate business in Mississippi, saying:

"The power under the Federal Government to carry on interstate commerce carries with it the use of the necessary means and appliances and instrumentalities for that purpose, and under the law of the United States, as decided, a person or corporation living or domiciled in a state has the right to solicit such commerce in other states, so long as its agents do not transact or complete the business in other states, which business must be consummated by the person or corporation, or its agent, in the state where the corporation is domiciled, or where the person lives."¹⁸

The Supreme Court in *Refrigeration Discount Corp. v. Turley*¹⁹ held that the appellant was not doing business in Mississippi. In that case appellant was sending meters to be placed on the refrigerators sold to Greenville, Mississippi, in which city a bank was requested by appellant to have the contract covering the merchandise signed, on the signing of

¹⁷199 So. 110 (Miss. 1940).

¹⁸*Morrison v. Guaranty Mortgage and Trust Co.*, 199 So. 110, 144 (Miss. 1940).

¹⁹189 Miss. 880, 198 So. 731 (1940).

which contract and the payment of the first installment, the refrigerators were to be delivered to the appellee in Greenville.

(4) Dissolution

In *Woodville Lodge No. 3581, Grand United Order of Odd Fellows v. Poole*²⁰ the court held that a court of equity in a proper case may treat a non-stock corporation as dissolved even though in a legal sense no dissolution has occurred, and that a dissolution may be implied by consent of all the members when meetings are voluntarily discontinued and activity of members as such comes to an end.

And the court went further to determine that the agreement, made by the members at the agreed dissolution of the corporation as to the property belonging to it, made the members tenants in common of the property; and the court held that the representatives or heirs of such members of the corporation at the time of its dissolution, who subsequently became deceased, would share in the property to the extent of such deceased members' shares therein.

D. PRINCIPAL AND AGENT

(1) Relationship of Principal and Agent

In *Crabb v. Comer*²¹ appellee was agent of a corporation to sell fertilizer in accordance with contract and with price lists to be furnished him by the corporation. In March and April, 1938, he received fertilizer from the principal, part of which he sold and collected for and the remainder of which he applied to his own use, remitting to his principal only a part of what had been paid him by the purchasers and none for that used by himself. When a representative called on him, an agreement was entered into whereby he made a note to the company for the amount he owed, calculating the fertilizer not paid for at credit prices. He executed the note and gave security. Suit was brought in chancery to reform and foreclose the security. Appellee defended on the ground of usury. The court said:

"When an agent, having in his possession the property of his principal, acts for himself and in his own interest as regards that property, the transaction, when completed to the extent that it is beyond recall, as in this case, must be given that interpretation which is favorable to the principal, rather than a construction favorable to the agent. This grows out of the inherent nature of the relationship of principal and agent, and the maintenance of the integrity of that relationship.²² . . .

²⁰190 Miss. 798, 1 So. (2d) 780 (1941).

²¹190 Miss. 289, 200 So. 133 (1941).

²²*Crabb v. Comer*, 190 Miss. 289, 296, 200 So. 133, 135 (1941).

It is one of the oldest maxims of the law that no man shall, in a court of justice, take an advantage which has his own wrong as a foundation for that advantage."²³

(2) Authority to Bind Principal

In *New Home Sewing Machine Co. v. Moody*²⁴ appellant's traveling salesman, a "selling agent," undertook to repossess from appellee certain machines with a view to straightening out the account of appellee with appellant, representing to appellee that he had instructions from appellant to take up the machines. The representation was denied by the appellant. The Supreme Court, quoting from another case, *Dahnke-Walker Milling Co. v. T. J. Phillips & Sons*²⁵ said, "it appears to be the settled law in all jurisdictions that the authority of the agent to bind his principal rests upon the powers conferred upon him by his principal. We think that it is fundamental that a selling agent, in the absence of evidence to the contrary, is not empowered to compromise." And the court held that the salesman's taking from the appellee a check to be applied by the appellant to appellee's account was not sufficient to constitute the salesman an agent of the seller to collect the indebtedness. Rather the purchaser in such cases makes the salesman his own agent to transmit the payment to the seller, unless salesman's authority from the seller to collect the indebtedness is shown.

In *Boehm v. Friedman*²⁶ the court held that an agent for an undisclosed principal is vested with authority to bind his principal when answering such pertinent inquiries as that involved in the case. The inquiries were as to the good working qualities of a mule purchased by appellant. And the court said that representations usually incident to such a transaction are held to have been made with authority by an agent entrusted with the sale of his principal's animal, the authority being by reasonable inference from the principal. The court indicated that the question of whether a mule is a good working mule is one that the owner can reasonably expect to be put by a prospective purchaser.

(3) Proof of Authority of Agent

In *New Home Sewing Machine Co. v. Moody*²⁷ appellee relied in defense of the suit on the authority of the salesman to retake the machines sold by him to the appellee, but revealed in evidence no proof of the salesman's agency for that purpose except the word of the salesman. The Supreme Court said, ". . . and the authority of an agent cannot be proved by the mere statement of the agent."

²³Crabb v. Comer, 190 Miss. 289, 296, 200 So. 133, 135 (1941).

²⁴189 Miss. 628, 198 So. 550 (1940).

²⁵117 Miss. 204, 207, 78 So. 6, 7 (1918).

²⁶190 Miss. 664, 1 So. (2d) 508 (1941).

²⁷189 Miss. 628, 198 So. 550 (1940).

E. SALES

(1) Rescission

In *Boehm v. Friedman*²⁸ a mule was purchased by appellant from one of appellees as the agent of the other appellee. The mule proved unsatisfactory as a work animal. It was carried back and offered back to the agent. In the same transaction in which the mule was bought appellant also bought some farm implements which he did not offer to return to the agent. The court observed, in deciding the question of damages for which suit was brought by appellant, that the appellant was not in a position to rely upon a rescission of the contract because he had not offered to return the farm implements.

(2) Warranty

In *Christenberry v. Saik*²⁹ the buyer of a Frigidaire had a Frigidaire expert examine the used Frigidaire before it was accepted by the buyer from the seller, the seller being neither a manufacturer nor a dealer. The court said:

"In an executed sale of an existing article, of which the seller is not the manufacturer, nor is a dealer possessed of expert knowledge, either actual or pretended in regard thereto, there is no implied warranty in the absence of fraud on the part of the seller, unless the defects complained of are latent, and the seller knows that the buyer has not relied on his own judgment, but on that of the seller, who knew or might have known of the existence of the defects."³⁰

(3) Sign Statute

In *Yellow Mfg. Acceptance Corp. v. American Oil Co.*³¹ the automobiles involved were sold by a dealer on title retention contracts. The contracts were sold to appellant, and the automobiles were subsequently repossessed. They were stored with the dealer who made the original sales, with authority to the dealer to look for and report prospective purchasers. Appellee, the dealer's landlord, bought in the automobiles at a distress sale for delinquent rents. Appellant brought suit in replevin as owner of the automobiles, and appellee defended on the ground, among others, that under the Sign Statute³² the automobiles were to be treated as the property of the dealer and were subject to sale for the rent of the dealer. The Supreme Court reviewed briefly several decisions under that statute, and said:

²⁸190 Miss. 664, 1 So. (2d) 508 (1941).

²⁹2 So. (2d) 142 (Miss. 1941).

³⁰*Christenberry v. Saik*, 2 So. (2d) 142 (Miss. 1941).

³¹2 So. (2d) 834 (Miss. 1941).

³²MISS. CODE ANN. (1930) §3352.

"The statute is highly penal. Where it applies, in effect it takes, without compensation, one person's property and gives it to another. It is to be strictly construed against any claim thereunder. How could Pearce have complied with the statute, considering the character of business in which he was engaged? By placing a tag on each automobile, showing that it belonged to the Acceptance Corporation? What character of sign should he have put over his place of business? The question is not without difficulty, but we are of the opinion that these automobiles were not acquired and used by Pearce in the ordinary course of his business, and therefore the statute does not apply."³³

(4) Conditional Sales—Insecurity Clause

In *Commercial Credit Co. v. Cain*³⁴ appellant deemed himself insecure under the "insecurity clause" of a title retention contract concerning an automobile. He retaken possession of the vehicle without force, but over the objection of appellee's husband, who then had possession of it. The court held that under the "insecurity clause," as in most title retention agreements, "the mortgagee may proceed upon such circumstances of presently apparent danger as would furnish probable cause for the belief that the security is unsafe when viewed in good faith by a man of reasonable prudence."³⁵ The court went further and declared the duty owed by the mortgagee to the mortgagor after such repossession, saying:

"When the mortgagee acts under that clause, he must give to the mortgagor without any unreasonable delay or unwarranted costs the opportunity to remove the insecurity or danger to the security and to have prompt redelivery to him of the property when this has been done; and in respect to this the mortgagee must impose no arbitrary or unreasonable terms, or conditions, but only such as ought to satisfy a reasonably fair and prudent person."³⁶

³³*Yellow Manufacturing Acceptance Corporation v. American Oil Company*, 2 So. (2d) 834, 836 (Miss. 1941).

³⁴190 Miss. 866, 1 So. (2d) 776 (1941).

³⁵*Commercial Credit Company v. Cain*, 190 Miss. 866, 871, 1 So. (2d) 776, 777 (1941).

³⁶*Id.* at 873, 1 So. (2d) at 778.

III.

CRIMINAL LAW

*L. A. Smith, Jr.**

A. VENUE

In *Woods v. State*¹ it was held that Section 1188, Mississippi Code of 1930, dealing with venue of prosecutions for larceny where the stolen property is carried into another county, contemplated cases where there was actual participation in the carrying of the property into such county. The appellant was shown to have committed a larceny, selling the stolen property to another who carried it, without appellant's help or connivance, into another county. The indictment and trial of appellant in that county, in the absence of participation by him in the removal of the stolen property thereto, is not warranted by said section. This construction is necessitated by Section 26, Mississippi Constitution, which provides that venue of prosecutions shall be in the county where the crime is committed.

In *Boyd v. State*² the appellant was convicted of raping a twelve year old girl. One of the two assignments of error noticed by the court was that venue was not proved. This resulted when the prosecutrix did not know in what state Rankin County was located. The court held that the testimony of other witnesses identifying the locale of the crime sufficiently established that it occurred in Rankin County, Mississippi.

In *Little, Chief of Police v. Wilson*,³ following a conviction in the police court of a municipality for the unlawful possession of intoxicating liquors, the appellant was sentenced to serve thirty days in jail and to pay a fine of \$100. All of the sentence was suspended "during good behavior" except \$50 of the fine, which was paid.

Thereafter officers made a search of certain premises belonging to the appellant, but which were occupied by a third party, and found intoxicating liquor. Whereupon, apparently without regard to appellant's guilt or innocence with respect to the possession of this liquor, the police justice revoked the suspension of the sentence. He imposed the remaining \$50 of the fine in the former case and directed the imprisonment of the appellant to serve the sentence. The appellant thereupon tendered an appeal bond to the police justice, seeking to appeal from the former conviction to the county court, but the police justice refused to approve the bond tendered or any

*County Attorney for Marshall County, Holly Springs, Mississippi.

¹190 Miss. 28, 198 So. 882 (1940).

²189 Miss. 609, 198 So. 561 (1940).

³189 Miss. 825, 199 So. 72 (1940).

bond and denied the appeal. The reasoning of the police justice in pursuing this course is not apparent, but from the court's opinion it seems to have been based upon the view that (1) no appeal lay after 10 days from the conviction and sentence; (2) no appeal lay from a plea of guilty in police court; and (3) no appeal lay from a conviction where the sentence had been partially served or satisfied.

The first and second of these propositions have previously been decided in Mississippi, the present case adding only that the same rule applies to appeals from convictions in police courts and justice of the peace courts to county courts as had previously been announced in cases of appeal from such inferior tribunals to the circuit court. The court stated that the time limitation upon such appeals applies only to civil cases, and that the statute prohibiting appeals following pleas of guilty applies only to appeals from the circuit to the supreme court.

In passing upon the third proposition, the court pointed out that Section 69, Mississippi Code of 1930, providing for appeal on pauper's oath from convictions in justice of the peace and police courts, without supersedeas, would be meaningless unless construed to provide for such appeals irrespective of the fact that the sentence imposed might have been partially served. It was also noted that such an appeal might, in some instances, be a valuable right even where the sentence was substantially served, as in cases where conviction carries civil disqualification.

B. PRELIMINARY COMPLAINT AND COMMITMENT

In *Farrar v. State*⁴ the appellant was convicted of a misdemeanor committed in district four of the county. There was no justice of the peace in that district, and he was charged before, tried and convicted by a justice of the peace of district one. It was contended on appeal that under Section 171, Mississippi Constitution no justice of the peace could acquire jurisdiction of a misdemeanor committed in a district other than his own. In overruling this contention, the court said that ordinarily the jurisdiction of a justice of the peace is confined within his district, and that the source of his jurisdiction is the constitution. Moreover, said the court, it was intended by the constitution to parcel out the entire judicial jurisdiction and leave none undisposed of. Nevertheless, since justices of the peace are often disqualified and since there are districts where no one will hold the office, the legislature had the power to enact Section 2097, Mississippi Code of 1930 to provide against these contingencies, there being nothing in the constitution prohibiting it. Consequently, there having been no justice of the peace in the district where the offense was committed, ap-

⁴² So. (2d) 146 (Miss. 1941).

pellant was properly charged, tried and convicted by the justice of the peace of another district.

In *Martin v. State*⁵ the appellant was charged with the commission of a felony by an affidavit made before and lodged with the circuit clerk. The circuit clerk issued thereon a warrant for his arrest, returnable *instante* before the judge of the circuit court "at any office." The appellant was arrested on this warrant and admitted to bail, the bail bond requiring him to appear before the circuit court "instante to answer the charge." Ten days later judgment *nisi* was entered, awarding the state recovery on the bond, and the sureties were summoned to show cause why the same should not be made final.

Of the several questions presented on the appeal, one was considered decisive: Was the issuance of the warrant by the circuit clerk and the consequent arrest of the appellant under such warrant lawful?

A majority of the court sitting *in banc* answered this question in the negative, set aside the judgment *nisi* and dismissed the proceedings upon the bond.

It appears to have been conceded that there is no express authority for the issuance of the warrant by the circuit clerk upon an affidavit. Section 2964, Mississippi Code of 1930 applies only to process issued by courts through their clerks and manifestly had no application to the question presented. The majority, therefore, concluded that there was no authority for the warrant. Further, they concluded there was no authority for the arrest, unless it was derived through Section 167, Mississippi Constitution, of itself alone, or in connection with the common law, or Section 1321, Mississippi Code of 1930.

Section 167, Mississippi Constitution⁶ and Sections 1320⁷ and 1321,⁸ Mississippi Code of 1930, dealing with conservators of the peace, were reviewed by the court in considering the stated proposition.

It was contended that the circuit clerk, being a civil officer, was *ex officio* a conservator of the peace. And it was contended that as such

⁵190 Miss. 32, 199 So. 98 (1940).

⁶Miss. CONST., §167 is as follows: "All civil officers shall be conservators of the peace, and shall be by law vested with ample power as such."

⁷Miss. CODE ANN. (1930) §1320 provides, in part: "The judges of the Supreme, circuit, and chancery courts and conservators of the peace throughout the state, and each judge of the county court and every justice of the peace is such within his county. Any conservator of the peace has power to take all manner of bonds and recognizances from persons charged on affidavit with crimes and offenses, for their appearance in the circuit court to answer thereto . . ."

⁸Miss. CODE ANN. (1930) §1321 provides, in part: "Any conservator of the peace may, by warrant issued under his hand, cause any person charged on affidavit with having committed, or with being suspected of, any offense against the law, to be arrested . . ."

he was vested with lawful authority under one of two provisions: (1) Either Section 167, Mississippi Constitution, providing that conservators of the peace, "shall be by law vested with ample power as such," without further implimentation by statute; or (2) Section 1321, Mississippi Code of 1930 which may be taken as the legislative grant of such authority to all civil officers under said constitutional provision as conservators of the peace.

The court said that to sustain this contention it would be necessary to disregard entirely the opening sentence of Section 1320, Mississippi Code of 1930, which enumerates certain officers as conservators of the peace in whom the specific power to issue warrants upon affidavits was lodged by the legislature, namely, the supreme, circuit and chancery judges, with statewide power, and county judges and justices of the peace, with county-wide power. Or, as the alternative, it would be necessary to consider that the legislative enumeration of these officers as conservators of the peace was intended to be only a partial list of the civil officers in whom the legislature had reposed the power as conservators of the peace which was sought to be exercised by the circuit clerk. Moreover, as those officers listed were civil officers, their listing in the cited statute was unnecessary if that fact alone made them conservators of the peace.

The majority opinion examines the historical background of "conservators of the peace" from its earliest beginnings in England to the present and reaffirms the doctrine previously announced that no English statute, however ancient, is a part of the common law of this state.⁹ The court concluded that the powers of conservators of the peace in Mississippi are only such as are defined by legislative enactment, except as to the arrest for crimes committed in their presence, a power possessed in common with private citizens.

The court reviewed the development of the several statutory enactments and found that Sections 1320 and 1321, Mississippi Code of 1930 comprise essential parts of a complete legislative scheme. The words in the latter section, "any conservator of the peace", apply and are limited to the officers designated as such in the preceding section. It followed that there was no lawful authority for the issuance of the warrant by the circuit clerk, the arrest of the appellant thereon was illegal, and the bond upon which he was enlarged was void, unless validated by Section 1246, Mississippi Code of 1930.¹⁰ The court said, however, that this section

⁹Jordan v. Roach, 32 Miss. 481 (1856); Boarman v. Catlett, 13 S. & M. 149 (Miss. 1849).

¹⁰Miss. CODE ANN. (1930) §1246 provides, in part: "All bonds . . . conditioned for the appearance of any party before any court or officer, in any state case or criminal proceeding, which shall have the effect to free such party from jail or legal

contemplates cases where the principal in the bail bond is lawfully in custody and has no application to cases where there is "an absolute want of power" in the officer making the arrest.

C. EVIDENCE

In *Boyd v. State*¹¹ one of the assignments of error noticed by the court was that there was no corroboration of the testimony of the prosecutrix, the appellant having been convicted of rape of a twelve year old girl. The court held that no corroboration was necessary and that the testimony of the prosecutrix is sufficient to sustain a conviction of rape where it is consistent with the surrounding circumstances. The court said the physical injuries of the girl and other attendant circumstances in evidence were, with the testimony of the prosecutrix, amply sufficient to sustain the conviction.

In *Wallace v. State*¹² officers went to a highway roadside drink stand armed with a search warrant for the premises and, concealing themselves, watched the owner deliver a number of packages to a succession of customers arriving in cars. Although not undertaking to state that such packages contained intoxicants, they made out a sufficient case of circumstantial proof to sustain the conviction of such owner for the conscious possession of intoxicating liquor. Their testimony was that said owner had, in each instance, gone to a certain spot beside his driveway entrance which, when searched by the officers, yielded a number of pints of whiskey. The court stated, however, that such evidence may have been insufficient to sustain a conviction of sale.

In *Martin v. State*¹³ the appellant was convicted on a charge of "complicity in the sale of beer" in a county where its sale had been outlawed. Appellant operated a cafe consisting of a front room in which customers were served and a back room, the two being connected by a door. An officer visited the front room, a public place, and was furnished probable cause for believing intoxicants were sold in the back room, although he saw no sale made. On this occasion he indicated his intention to enter the back room and was told it was a private place. He then went to the rear of the building and, climbing up, looked into the back room through a window, where he saw persons drinking beer. He then went upon the back porch of the building and from there heard persons call for cans of

custody of any sort, shall be valid and bind the party and his sureties, according to the condition of such bond . . . whether it was taken by the proper officer or under circumstances authorized by law or not, or whether the officer's return identify it or not."

¹¹189 Miss. 609, 98 So. 561 (1940).

¹²189 Miss. 763, 199 So. 78 (1940).

¹³190 Miss. 898, 2 So. (2d) 143 (1941).

beer and saw sales made. He made arrests two days later. He had no search warrant. An objection was interposed to the introduction of the evidence, and the overruling of the objection was assigned as error. In reversing the case the court pointed out that the officer did not go onto the porch for the purpose of making an arrest for a misdemeanor committed in his presence, but he went to ascertain whether a misdemeanor was being committed. Nor was it material that "probable cause" existed for believing that beer was being sold, for the right to search without warrant on probable cause is limited to automobiles and other means of transportation mentioned in Chapter 244, Mississippi Laws of 1924. The court further said, conceding the back room to be a public place, an entrance was provided, and the officer's entry upon the back porch, over which no invitation to the public was held out, constituted an invasion of appellant's rights. Thus the evidence procured was illegal and inadmissible.

In *Grantham v. State*¹⁴ there was a conviction of the unlawful possession of whiskey. The appellant operated a place of business known as the Green Cabin. At midnight appellant drove his car to the Green Cabin and spoke to one Nichols who was in charge. Shortly after appellant had driven away, another car came from the same direction from which appellant had come, drove to the rear of the Green Cabin, and a negro there employed by appellant went to the car and procured two cases of whiskey. The court held that this evidence, although denied by appellant, warranted conviction, saying:

"If the circumstances detailed above do not warrant a verdict of guilt, there is left available, as the only alternative hypothesis, the theory that the negro employee of appellant was, at the latter's place of business and near his home, conducting an illicit liquor business along the public highway under the nose, but not under the eye, of appellant, whose approval he did not seek, and whose disapproval he did not fear."¹⁵

It appears that the court considered these facts to exclude every reasonable hypothesis save that of appellant's guilt.

D. TRIAL

In *Davis v. State*¹⁶ the court held that an instruction to the jury warranting a verdict of guilty if, "deceased was killed unlawfully, willfully and feloniously and with malice aforethought, and that the defendant was present and aided, assisted and encouraged such killing . . .," is not subject to the criticism that it omits the necessary element of felonious intent

¹⁴190 Miss. 887, 2 So. (2d) 150 (1941).

¹⁵*Grantham v. State*, 190 Miss. 887, 891, 2 So. (2d) 150, 151 (1941).

¹⁶189 Miss. 768, 198 So. 572 (1940).

on the part of the appellant in aiding the killing. The court stated that one aiding such killing necessarily did so feloniously. The facts stated in the opinion showed active brutal participation by the appellant in the killing.

In *Smith v. State*¹⁷ there was a special venire. The trial judge called the entire venire to the bar and inquired generally as to their qualifications as jurors. To each of those who were found qualified and who were not excused upon that examination, a number was assigned. Thereupon twelve men were called to the box, and six additional men were placed in chairs in front of it. These eighteen men were then examined by the court as to the case about to be tried. Such of them as were found by the court's questions to be disqualified for cause were replaced by others, until eighteen men, qualified so far as the court's questions disclosed, were presented to the parties for challenge for cause. They were presented first to the state and then to the defendant. Finally, after all challenges for cause for both sides had been made to the eighteen men, twelve of them, selected according to their respective numbers, were placed in the box. They were presented for peremptory challenge, first to the state and then to the defendant. The vacancies in the array caused by the state's peremptory challenges were filled by other jurors already found to be qualified for cause as above illustrated. When accepted by the state, the twelve men were then presented to the defendant. The vacancies caused by his peremptory challenges were likewise filled from the men already found to be qualified for cause. This process was repeated until the full jury was accepted by both sides. The appellant assigned as error that he was confronted with more than twelve men to challenge for cause. The court pointed out that, challenge for cause being without limit, he was not prejudiced but was actually accorded an advantage in being able to know in advance the next man to be called. In a specially concurring opinion, Chief Justice Smith took the view that Section 1277, Mississippi Code of 1930,¹⁸ requiring all peremptory challenges by the state to be made before the juror is presented to the prisoner, was violated. But he said, the statute merely being directory and no prejudice having resulted, this did not constitute reversible error.

In *Lifer v. State*¹⁹ the appellants were convicted of the larceny of cattle upon the testimony of an accomplice. This testimony was substantiated, if at all, by the demeanor of the appellants on the stand and by

¹⁷190 Miss. 24, 198 So. 562 (1940).

¹⁸Miss. CODE ANN. (1930) §1277 provides, in part: "... but all peremptory challenges by the state shall be made before the juror is presented to the prisoner; and in all cases the accused shall have presented to him a full panel before being called upon to make his peremptory challenges."

¹⁹189 Miss. 754, 199 So. 107 (1940).

some inconsistencies in their statements which were made when questioned by officers following their arrest. The court held that an instruction for the state, though technically "inaccurate" in omitting to charge that participation in larceny to warrant conviction had to be with knowledge, was not sufficiently misleading to warrant reversal. In reaching this conclusion the court took into consideration what was termed the, "notorious prevalence of stealing of such property as cattle," and concluded that the circumstances of the case placed the appellant under the duty to make inquiry.

In *Hand v. State*²⁰ the appellant was convicted of manslaughter. His defense below had been not guilty by reason of temporary insanity at the time of the homicide. It appears that the appellant became intoxicated at a political picnic on Wednesday and continued drinking until the following Sunday morning, when he sent his son for more whiskey. The son brought a brother who was a physician and who, finding appellant in a deplorable condition, gave him a double dose of morphine, a dose of phenobarbital, and a supply of seconal to be taken every three or four hours. Throughout the following day appellant remained at his home but acted abnormally. At about eleven o'clock that night he declined to go to bed saying he could not sleep. An hour later he went into the room where his son and his father were sleeping, took a shot gun, and at close range shot his son to death. He then exclaimed, "Did I kill Malcolm? My God, why did I do it and how did I do it?"

He was committed to an insane asylum. There six psychiatrists observed him and, on obtaining his case history, found that he had suffered a complete amnesia from the time he left the picnic Wednesday until after the homicide. He was said, during that period, to be incapable of knowing the nature of his acts because of the alcohol, morphine, phenobarbital and seconal. The court held, nevertheless, that the question was one of fact for the jury.

An instruction in the case on voluntary intoxication was held not erroneous upon the ground that the drugs were administered because of appellant's voluntary intoxication.

In *Lee v. State*²¹ and *Williams v. State*²² it was held that on a trial *de novo* in the circuit court, following an appeal from a conviction in a justice of the peace court, it is not necessary in order to confer jurisdiction upon the circuit court that the transcript of the proceedings in such justice of the peace court be introduced in evidence.

²⁰190 Miss. 314, 200 So. 258 (1940).

²¹190 Miss. 877, 1 So. (2d) 492 (1941).

²²1 So. (2d) 493 (Miss. 1941).

In *Swanner v. State*²³ the court, without setting out or indicating the nature of the evidence in any way, reversed the conviction of appellant for the error of the trial court in granting an instruction to the state based upon the maxim *falsus in uno, falsus in omnibus*. The court considered the giving of the instruction reversible error "on the evidence here presented."

In *Cruthirds v. State*²⁴ the appellant was convicted of the unlawful possession of whiskey. He was indicted in Simpson County on the thirteenth of September. A warrant for his arrest was mailed to Harrison County where he lived, and he was arrested at 10 o'clock a. m. the twentieth of September. He was allowed three minutes to confer with his attorney. He was then returned to Simpson County for trial, arriving about dark. He was immediately arraigned and pleaded not guilty, and the case was set for trial at 8:30 the following morning. His attorney left Gulfport at 4:30 a. m., and five minutes after he reached the court, the appellant was placed on trial. The conviction was reversed by the court upon the ground that the appellant had not been accorded a fair and impartial trial.

E. MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT

In *Grant v. State*,²⁵ during the term at which an indictment for murder was returned against the appellant, the circuit judge died without having signed the minutes of the court. After the lapse of several days, on each of which days the circuit clerk entered an order adjourning the court until the following day, the successor to the deceased judge appeared with his commission from the governor. He had the same recorded and proceeded with the business of the court. The case against the appellant was called in due course, and a motion to quash the indictment was made upon the ground that the new judge was without authority to sign the minutes of the court's business transpiring prior to the day on which he assumed office. Therefore, the former judge not having signed the minutes, there was no valid indictment against the accused. The presiding judge heard evidence upon the motion and found, as a matter of fact, that the minutes of the proceedings entered each day by the clerk were correct. Thereafter the appellant was tried and convicted of murder. He appealed, assigning only one ground for reversal, the action of the trial court in overruling his motion to quash the indictment. The court reviewed the applicable statutes²⁶ and stated that the case was controlled by the

²³2 So. (2d) 142 (Miss. 1941).

²⁴190 Miss. 892, 2 So. (2d) 145 (1941).

²⁵189 Miss. 341, 197 So. 826 (1940).

²⁶MISS. CODE ANN. (1930) §§733, 734.

principles announced in *Palmer v. State*.²⁷ The death of the presiding judge during the term was said to be analogous to a vacancy in office occasioned in the *Palmer* case through the expiration of the judge's term. The court said, moreover, that the personnel of the court was wholly immaterial under Section 750, Mississippi Code of 1930,²⁸ as was the failure to sign the minutes each day. For the section required only that the minutes be signed on or before the adjournment of court, and the successor to the deceased judge, under his commission, succeeded to all his powers, including that of signing the minutes for the term.

F. APPEAL AND ERROR

In *Whitten v. State*,²⁹ following the court's decision to reverse the case because venue of the crime was erroneously laid in Grenada County, a question arose as to the manner of requiring bail pending the action of the grand jury of the proper county.

The court, speaking through the majority opinion, proceeded under Section 3378, Mississippi Code of 1930³⁰ to render, "such judgment . . . as the court below should have rendered. . . ." They reversed the judgment appealed from, discharged the appellants from the indictment, but held them under their appearance bonds to await the action of the next grand jury of the appropriate county. The court said that of course their sureties might surrender them and require them to make a new bond, should they desire to take that course.

Pending the appeal the appellants had been at large under bail bonds executed under Sections 46 and 47, Mississippi Code of 1930, conditioned to appear in the Supreme Court of the State of Mississippi and the Circuit Court of Granada County and abide by and perform such sentence or

²⁷73 Miss. 780, 20 So. 156, 157 (1896).

²⁸The statute reads as follows: "The minutes of the proceedings of the Supreme, circuit, chancery and county courts shall be entered by the clerk of each, respectively, in the minute-book of the court, against the next sitting of the court, if practicable, when the same shall be read in open court; and when corrected shall be signed—the minutes of the Supreme Court by the chief justice or presiding judge, of the circuit court by the circuit judge, of the chancery court by the chancellor and of the county court by the county judge; and on the last day of the term the minutes shall be drawn up, read, and signed on the same day, or before the adjournment of the court."

²⁹189 Miss. 809, 199 So. 74 (1940).

³⁰The statute reads as follows: "The Supreme Court shall hear and determine all cases properly brought before it at the return term, unless cause be shown for a continuance; and in case the judgment, sentence, or decree of the court below be reversed, the Supreme Court shall render such judgment, sentence, or decree as the court below should have rendered, unless it be necessary, in consequence of its decision, that some matter of fact be ascertained, or damages be assessed by a jury, or where the matter to be determined is uncertain; in either of which cases the suit, action or prosecution shall be remanded for a final decision; and when so remanded, shall be proceeded with in the court below according to the direction of the Supreme Court, or according to law in the absence of such directions."

judgment as may be rendered in the case. In the dissent, the view was expressed that the judgment entered by the court was an inadmissible enlargement of the obligation of the sureties upon the bail bonds, which the court was without authority to make. It was pointed out that had the court below dismissed the prosecution, as it should have done, it could only have ordered the defendants into the custody of the proper officer and could not have continued to hold them under the same bail bonds. The further view was expressed in the dissent that the reversal of the case and its remand would have required the appellants to appear before the court below under Section 3395, Mississippi Code of 1930, where appropriate disposition could have been made of them.

G. THE CRIMINAL ACT

In *Rouse, Sheriff v. Sisson*³¹ suit was begun by the owner of a certain machine for an injunction against its threatened seizure and destruction by the sheriff as a gambling device. The appeal was from a decree granting the injunction.

The majority, in holding that the machine was not a gambling device, went further and held that, not being a gambling device, it was not a slot machine of the type condemned by Chapter 353, Mississippi Laws of 1938, which it was said, under the maxim *noscitur a sociis*, applied only to coin-in-the-slot operated machines which also were gambling devices.

The machine in question was called an "I. Q." machine. On depositing a coin, the player was automatically presented with a question, the nature of which could not be known in advance. He was allowed twenty seconds within which to correctly answer the question by depressing the proper key of the machine. If he failed to answer correctly or within the time limited, his coin was forfeited to the machine. If, however, the proper key was depressed within the twenty seconds, a definite prize or reward was given the player, the amount of which was fixed in advance. The court stated that the game presented by this device was solely one of skill and did not contain the element of chance necessary to constitute gambling. The court cited the case of *Wortham v. State*³² which involved a billiard game, in support of this proposition. On the "I. Q." machine, each question had from two to seven alternative answers, only one of which was correct. There were seven numbered keys for use by the player in choosing the answer of his selection. In addition, two other keys marked "true" and "false" were provided, as some plays of the machine

³¹190 Miss. 276, 199 So. 777 (1941).

³²59 Miss. 179 (1881).

resulted in the submission of propositions, the truth or falsity of which the player attempted to determine.

There was a dissent from the majority view, citing *Crippen v. Mint Sales Co.*³³ where it was held immaterial whether the slot machines outlawed by Section 821, Mississippi Code of 1930 were gambling devices or not. Considerable attention is given in the dissents to the fact that the appeal of the device is predominantly to the gambling instinct.

IV.

INSURANCE

*George T. McClintock**

A. CASUALTY INSURANCE

*Commercial Casualty Ins. Co. v. Tri-State Transit Co. of Louisiana, Inc.*¹ is an interesting case. An automobile liability policy was involved which agreed to indemnify the insured against loss from liability arising from claims for damages caused by accidents growing out of the ownership, maintenance or use of the vehicles covered by the policy, if such claims be made on account of bodily injury or death suffered by person or persons as the result of an accident occurring during the policy period, and to defend for insured suits whether groundless or not. The bus company settled a death claim founded upon the death of a passenger who had to walk a mile in cold weather as a result of the bus's breaking down, the passenger contracting pneumonia and dying about two weeks later. The bus company later sued the insurance company. In the case it was decided by the court that whether an injury is accidental is to be determined from the standpoint of the person injured, and that if the injury comes to him through external force, not of his own choice, the injury is accidental. The court said the fact that the passenger was not compelled to leave the bus was of no consequence. It further observed that the policy does not require as a condition of liability that the injury be the proximate result of a negligent act which happened in the actual use or operation of the vehicle.

It can be seen that this decision will have a tendency to broaden the obligations of insurance companies writing automobile liability policies.

It was also held that the insurance company was liable to the bus company for failing to defend the action brought against the insured to

³³139 Miss. 87, 103 So. 503 (1925).

*Member Mississippi and Hinds County Bars; Jackson, Mississippi.

¹190 Miss. 560, 1 So. (2d) 221 (1941).

the extent of the sums used in making a compromise of the claim, that is, a reasonable compromise, and to the extent of reasonable expenses for investigation of the facts and preparation of a defense of the suit.

In the case of *St. Paul Mercury & Indemnity Co. v. Ritchie*² the court dealt with an interpretation of a "Standard Employer's Liability Insurance Policy." The policy provided in effect that the company agreed to indemnify the insured from loss on account of personal injuries to the employees of insured covered by the policy, where such injuries were caused by the negligence of insured, and, further, that the company would furnish medical attention for any accident covered for any one employee to the limit of \$500.00. An employee was injured to such an extent that his medical expenses amounted to more than the \$500.00 limit. An adjuster obtained a release from the employee. The release recited that no promises other than those contained in the release were made as an inducement for the signing of it. At the trial of the case, however, the evidence showed that the adjuster, at the time the release was signed, made an oral agreement with the employee and employer that the insurance company would take care of medical expenses in excess of the policy limit of \$500.00. The insurance company contended that the adjuster had no authority to obligate the company to pay more than the maximum amount provided in the policy.

The policy contained a provision as follows:

"No change in the agreements . . . of the policy . . . shall be valid unless made by the President, a Vice President, Secretary or an Assistant Secretary of the company, nor shall notice to, or knowledge possessed by, any agent or any other person, be held to waive, alter or extend any of such agreements. . . ."

Appellee relied upon Section 5196, Mississippi Code of 1930, which in effect provides that every person who adjusts any loss for an insurance company shall be considered the agent of the company as to all the duties imposed by law, irrespective of stipulations or conditions contained in the policy contract. Appellee also relied upon the right to show by parol the true consideration of the release in question. The court held that the words, "as to all the duties and liabilities imposed by law," *ex vi termini* do not refer to duties and liabilities that grow out of the contract of insurance, such duties and liabilities being determined by the provisions of the contract itself, but do refer to duties and liabilities imposed on insurance companies and their agents by law outside and independent of the provisions of the contract of insurance. The court stated that the statute is eliminated, and that the provisions of the policy must

²190 Miss. 8, 198 So. 741 (1940).

control, under which the adjuster had no authority to enlarge the provisions of the policy. There was a dissenting opinion by Justice Ethridge.

The case of *Commercial Casualty Ins. Co. v. Skinner*³ held that if an automobile liability policy is one of indemnity against liability as distinguished from indemnity against loss actually sustained, the insurer is subject to garnishment by an injured person who recovered a judgment on a claim which is within the protection afforded by the policy.

The court also held that the insurer could not escape liability under the policy because the motor number of the bus was different from the motor number in the policy, where the bus was properly described except as to the motor number. The evidence showed that during the previous year the old motor had been replaced with a reconditioned motor and that the company took the description of the bus from the old policy. The court said that the motor number was only a part of the description—that it might be entirely disregarded and the remainder of the description would be sufficient to identify the bus.

The insurer contended that the insured did not own the bus in question. The court held that the policy covered liability growing out of the ownership, maintenance or use of the bus.

B. FIRE INSURANCE

In the case of *Liverpool & London Globe Ins. Co. v. Delaney*⁴ it was held that the reservation of a one-half interest in the oil, gas and minerals of a piece of property was valid and did not result in the grantee and his subsequent grantees not having "unconditional and sole ownership" of the land mentioned within the meaning of the policy. It was said the fact did not increase the risk as the loss would fall on the owner of the surface. The policy was issued on a verbal application by insured's husband, and the evidence showed that he informed the agent of a policy covering the house. The agent testified he did not recall the policy. The policy was not delivered at the time but was later mailed. The husband formerly owned the property and conveyed it to a third party reserving an undivided one-half interest in all oil, gas and minerals.

The court reiterated the rule that a local agent of an insurance company who is furnished by it with blank policies to be filled in, countersigned by him and issued, has all the power of a general agent of the company. When issuing such policies he may waive any of their provisions. The court distinguishes this case from the case of *Saucier v. Life & Cas-*

³190 Miss. 533, 1 So. (2d) 225 (1941).

⁴190 Miss. 404, 200 So. 440 (1940).

ualty Ins. Co.⁵ which dealt with the authority of special agents of insurance companies.

The case of *Staple Cotton Co-operative Ass'n v. Yazoo & M. V. R. R.*⁶ dealt with a policy containing a provision to the effect that the policy would be free of any liability for cotton in possession of any carrier or bailee who may be liable therefor and free from liability for cotton shipped under a bill of lading containing a stipulation that the carrier would have the benefit of any insurance thereon. The insurer agreed with the insured that it would advance the insured, in event of loss, the amount of the loss as a loan without interest, and this was done after a loss to the cotton occurred while it was in possession of the railroad company. The railroad company contended that the money paid to appellant by the insurer inured to the railroad company's benefit, but the court held that the agreement between the insurance company and appellant did not relieve the railroad company from liability to the owner of the cotton. The court stated that a different result would have been reached if the insurance policy had not contained the provision in question.

C. LIFE INSURANCE

In the case of *Metropolitan Life Ins. Co. v. Lindsey*⁷ it was held that life insurance companies must have notice of a claim of injury in such a reasonable time as to permit a fair investigation of the facts; that it must have "reasonable notice" or "timely proof." Five years was not a reasonable time to wait in order to give notice to the company. A dissenting opinion by Justice Ethridge observed that what constitutes reasonable notice should be a jury question. Further, that before the court can take from the jury the question, the delay must be such that reasonable men could not agree, and that by analogy the statute of limitations in each case should be followed.

In the case of *Life and Casualty Ins. Co. v. Walters*⁸ there was involved a policy containing a provision, "if insured is pregnant at date of issue of policy and death results from pregnancy," the company would not be liable. Insured was single at issue of policy, and the date of the stillborn child was three months and four days after the policy was issued. The date of birth was shown by a certificate from the Department of State Board of Health. The court held that the certificate was only *prima facie* evidence of facts stated herein. Further, the attending doctor's statement that the period of gestation was "about" six months made

⁵189 Miss. 693, 190 So. 625 (1940).

⁶189 Miss. 387, 197 So. 828 (1940).

⁷189 Miss. 600, 198 So. 282 (1940).

⁸190 Miss. 761, 198 So. 746 (1940).

it a jury question whether insured was pregnant on date of issue of the policy.

The case of *Pratorians v. McCrary*⁹ deals with a suit on a life policy by the beneficiary, in which suit the defense was that the policy was forfeited by non-payment of the premiums. The assured had borrowed money from the company on the policy, but the loan was not due at the time of the assured's death. However, no premiums had been paid for several months prior to his death. The court held that for the policy to have been forfeited, there must have been a default in the payment of both the loan and the premiums before the death of the assured.

In the case of *National Life and Accident Ins. Co. v. Green*,¹⁰ it was held that delivery of an insurance policy would not waive the company's right to plead the defense of insured's unsound health, also the provision in the policy that if the insured was not in sound health when the policy was delivered the company would only be liable for the premiums paid was valid and binding on insured although said provision was placed in the policy for the benefit of the insurer.

The case of *Saucier v. Life and Casualty Ins. Company of Tennessee*¹¹ was probably the most interesting case decided by the court. The majority opinion was rendered by Chief Justice Smith. This was a suit by a beneficiary on a life policy which contained a provision to the effect that the policy should not take effect until the full premium was paid in cash and the contract delivered and accepted during the life time and good health of the assured. There was another provision in the policy to the effect that only the president, vice-president, secretary, assistant secretary, actuary or treasurer had the power on behalf of the company to make or modify the contract. A solicitor for the company obtained an application from deceased, and the application contained a provision that no agent, except officers of a company, had the power on behalf of the company to make, modify, or discharge the contract.

The policy was delivered to appellant, the premium was not paid, and appellant died before the agent returned to collect the premium. At the time he delivered the policy, however, the evidence showed that he made the statement to insured's wife, "Here is your policy, if anything happens to your husband today or tomorrow, your policy is in force." Appellant denied liability, and suit was brought by appellee.

The case involved construction of Section 5196, Mississippi Code of 1930. This section in effect provides that every person who solicits in-

⁹2 So. (2d) 552 (Miss. 1941).

¹⁰2 So. (2d) 838 (Miss. 1941).

¹¹189 Miss. 693, 198 So. 625 (1940).

insurance on behalf of an insurance company shall be held to be the agent of the company for which the act is done or the risk is taken, as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract.

The court held that the words, "as to all the duties and liability imposed by law," referred not to duties and liability growing out of the contract of insurance, but to duties and liability imposed on insurance companies and agents by law independent of the insurance contract. The court said that to construe the clause otherwise would be violative of "due process of law."

The court stated that prior cases held that the effect of the statute was to make all persons who do any of the acts specified in it general agents of the company, although the company may have conferred on them merely limited authority. The court said that construction interfered with the right of contract. This case expressly overrules several former decisions of the court.¹²

This case is also distinguished from *Liverpool & London Globe Indemnity Co. v. Delaney*,¹³ which dealt with the acts of the local agent.

V.

PLEADING, PRACTICE, AND PROCEDURE

*John M. Kuykendall**

A. CRIMINAL CASES

In reviewing the criminal cases decided by the court we find nothing especially new or of such character as to call for lengthy discussion. The court naturally has passed on many cases of importance to the litigants, but, following its well established course, the court has not burdened the reports with matters of no interest to the bar and public. Many cases are to be found in which the weight and sufficiency of the proof to support the verdict was discussed, but, as each case of this character stands on the proof in the particular cause, no good purpose would be served by a review of these.

In *Smith v. State*¹ the court reannounced the well established rule that where there is no substantial conflict between evidence for the state

¹²Capital Paint & Glass Co. v. St. Paul Mercury & Indemnity Co., 180 Miss. 341, 176 So. 729 (1937); Interstate Life & Acc. Ins. Co. v. Ruble, 160 Miss. 206, 133 So. 223 (1931); Lamar Life Ins. Co. v. Kemp, 154 Miss. 890, 124 So. 62 (1929); Laurel Mills v. Ward, 134 Miss. 447, 99 So. 11 (1924).

¹³190 Miss. 404, 200 So. 440 (1940), cited *supra* note 4.

*Circuit Judge, 17th Circuit District; Charleston, Mississippi.

¹198 So. 561 (Miss. 1940).

and that for the defendant, and that where any inference of guilt which might be drawn from the evidence for the state disappeared when the evidence for the defendant came in, the court should grant the defendant's motion for a directed verdict.

But in *Cunningham v. State*² it is said that, where there is substantial evidence of defendant's guilt, the court should not direct a verdict of not guilty.

*Boyd v. State*³ is to the effect that the law does not require the testimony of the person alleged to have been raped to be corroborated if consistent with surrounding circumstances and conditions shown by the evidence, the jury being the sole judges of the credibility of the witnesses.

In *Lifer v. State*⁴ it is held to be the settled law of our state that a person may be convicted on the uncorroborated testimony of an accomplice if his testimony is reasonable, and that, when even slightly corroborated, it is sufficient. This is true even though the accomplice has been convicted or held to be guilty.

Serio v. Gully,⁵ a civil case, applies to the enforcement of the criminal law; hence, we list it here. There the court applied Section 1792, Mississippi Code of 1930, to a suit brought by the State Tax Collector to enforce a liquor penalty under Section 2000, Mississippi Code of 1930. The court held that where the operator of a liquor nuisance is called to testify for the state in a suit brought against him, he is immune from prosecution and must be discharged. This decision follows the *Malouf* case.⁶

Where the defendant made no specific objection to variance between the indictment and the prosecuting witness's testimony as to his given name, he was held to have waived such objection.⁷

A defendant convicted on a plea of guilty in the justice of peace court, may appeal to the circuit or county court and there try his case *de novo*. There is no time limit as to the appeal.⁸

In *Lee v. State*,⁹ which followed *Myrick v. Mansell*,¹⁰ the court held that in a trial in circuit court, on appeal from a justice of the peace court in either civil or criminal cases, it is not necessary to introduce in evidence

²200 So. 248 (Miss. 1941).

³189 Miss. 609, 198 So. 561 (1940).

⁴189 Miss. 754, 199 So. 107 (1940).

⁵189 Miss. 558, 198 So. 307 (1940).

⁶*Malouf v. Gully*, State Tax Collector, 187 Miss. 331, 192 So. 2 (1939).

⁷*Jackson v. State*, 189 Miss. 672, 198 So. 625 (1940).

⁸*Little, Chief of Police v. Wilson*, 189 Miss. 825, 199 So. 72 (1940).

⁹190 Miss. 877, 1 So. (2d) 492, *sugg. err. overr.*, 2 So. (2d) 148 (1941).

¹⁰184 Miss. 701, 184 So. 447, 185 So. 581 (1939).

the transcript of the proceedings in the lower court, but it is necessary that such transcript be filed in the higher court to give to the court jurisdiction of the cause.

In *Martin v. State*¹¹ will be found a most interesting discussion of the power of a conservator of the peace. It was there stated that a circuit clerk can not issue a warrant for arrest on an affidavit filed with him.

In *Thompson v. State*¹² the court, quoting from the *Lofton* case,¹³ condemns a charge given for the state saying:

"This form of charge, declaring a defendant estopped to plead self defense, is an exceedingly unwise one to be given. . . . Old paths are safe paths . . . if the prosecution will ask a few and very simple charges and trust more to the common sense and sound judgment of the juries of the country, they will expose their circuit judges to far less risks of reversals, secure just as many convictions, and have far fewer cases reversed."

*Woods v. State*¹⁴ holds that, while in larceny the offense is considered as committed in every county into which the thief carries the goods, yet, where the stolen property is carried into another county without the person by whom it was stolen being in any way a party thereto, no crime is committed by him in the county into which the property was carried.

In *Millwood v. State*¹⁵ the court said that, where the accused is prosecuted as a third offender, indictment must charge and proof must show that the accused had been convicted of first offense, that he had committed the second offense and was convicted of it, and that after the successive convictions he committed the third offense.

In *Cruthirds v. State*¹⁶ it is said that a fair and impartial trial as guaranteed under the constitution includes a reasonable opportunity to prepare for trial, and that:

". . . while speedy trials are commendable in trial judges, zeal in this respect must have due regard for the rights of defendants. This right is more valuable than the saving."¹⁷

B. CIVIL CASES

(1) Organization of Courts and Court System

(a) Place of the Holding of the Court

¹¹190 Miss. 32, 199 So. 98 (1940).

¹²190 Miss. 639, 642, 200 So. 715, 716 (1941).

¹³*Lofton v. State*, 79 Miss. 723, 31 So. 420 (1902).

¹⁴190 Miss. 28, 198 So. 882 (1940).

¹⁵190 Miss. 750, 1 So. (2d) 582 (1941).

¹⁶190 Miss. 892, 2 So. (2d) 145 (1941).

¹⁷*Cruthirds v. State*, 190 Miss. 892, 898, 2 So. (2d) 145, 146 (1941).

In *Marsalis v. State*¹⁸ the court discusses the question of whether a judge of the county court can enter a legal order providing that a part of the court term may be held at the county courthouse and the balance of the term in some other town in the county.

(b) *Interchange of Judges*

Whether one chancellor can call in a chancellor of another district on the ground of his own disqualification or whether he should certify such disqualification to the governor so that there might be appointed a special chancellor to preside is discussed in *Anderson v. Anderson*.¹⁹ It was held that this is a matter pertaining to the administrative functions of the judge's office. His action in that regard is not subject to review.

(c) *Organization of Court—Necessity for Jury*

In *McMillan v. State*²⁰ it was said that a court may be organized and competent for business without empanelling juries. The court may recess from time to time within the period scheduled for the term. The holding approves a method for disposing the business of a circuit court with a savings of jury expense. The judge, in following this course, may hold "non jury" terms instead of pretermittting terms. The court, being convened on the first day of the term without a jury, can sound the docket, dispose of non jury cases, set the docket, then call jurors. Thus the expense of idle jurors is saved. Many civil cases are settled at the term, and this can be done without the cost of idle jurors.

(d) *Juries*

In *Smith v. State*²¹ the trial court followed a plan which was a bit out of the ordinary in requiring challenges for cause to the jury to be made to a larger group than twelve. While the court said this was not reversable error, Chief Justice Smith, in a separate opinion, states that the better practice is to follow the statute.

While these cases were criminal cases, in view of the fact that the announcement made in each case applies to the practice generally, we have listed them here.

The court in *Sanders Cotton Mills v. Moody*²² states that the purpose of the statutes with reference to the selection of juries was, so far as possible, to prevent tampering with the jury. The case was reversed because the statute had not been followed.

¹⁸2 So. (2d) 792 (Miss. 1941).

¹⁹190 Miss. 508, 200 So. 726 (1941).

²⁰189 Miss. 613, 198 So. 29 (1940).

²¹190 Miss. 24, 198 So. 562 (1940).

(e) *Transfer of Cause*

*Craig, Tax Collector v. Wood*²³ states the rule to be that, where the cause states grounds for equitable relief only, a case should not be transferred to the circuit court. However, if it is erroneously transferred, the circuit court must proceed with it. The case can not be transferred back to the chancery court from whence it came, and, if the case is not proceeded with, the circuit court must dismiss it.

Where jurisdiction of the court of equity was invoked solely on the untenable ground of discovery, but the bill showed that complainant sought recovery of allegedly usurious interest paid defendant bank, the cause should not have been dismissed but should have been transferred to the circuit court. This is held in *Williams v. Deposit Guaranty Bank*.²⁴

(2) Pleading at Law

(a) *Institution of actions*

In *Shackleford v. N. Y. Underwriters Ins. Co.*²⁵ the court states that the chancery rule making the filing of the bill of complaint the beginning of a suit applies to a declaration filed in the circuit court if process is issued thereon. When the action is so commenced, the clerk is under duty to issue the proper process immediately, unless otherwise instructed by the party filing such suit. A plaintiff may assume that such duty has been performed and will not be caused to suffer for any default of the clerk in that regard.

(b) *Cause of action*

In *Commercial Credit Co. v. Newman*²⁶ it was held that distinct causes of action arise upon the due date of each installment and that successive actions may be maintained on each installment. The application of the doctrine of *res adjudicata* in reference to installment payments is also discussed.

(c) *Appearance*

In the *Finklea* case²⁷ the court reannounced the rule that special appearances have little room for operation in Mississippi—none where the parties voluntarily appear.

²²22 So. (2d) 815 (1941).

²³190 Miss. 258, 199 So. 772 (1941).

²⁴190 Miss. 685, 1 So. (2d) 486 (1941).

²⁵189 Miss. 396, 198 So. 31 (1940).

²⁶189 Miss. 477, 198 So. 303 (1940).

²⁷*Finklea Bros. v. Powell*, 189 Miss. 454, 198 So. 293 (1940).

But in *Cudahy v. Smith*²⁸ it was held that, when a court has no territorial jurisdiction over a foreign corporation because the corporation is not found in the state, the appearance of such corporation does not waive its immunity to suit or the lack of jurisdiction. The corporation can appear for the purpose of presenting the question of territorial jurisdiction and, if successful, be held as not appearing generally. A very interesting discussion of the service of process on foreign corporations appears in this case.

(d) *Inconsistent Pleas*

In *Stone v. Grenada Grocery Co.*²⁹ it is said that inconsistent pleas in a court of law may be filed together. And, where a case is reversed, the parties may take a position, when the case comes back to the lower court, which involves an inconsistency as compared with that taken on the first trial.

(e) *General Issue Only Plea in Replevin*

*Commercial Credit Co. v. Newman*³⁰ holds that in a replevin suit a plea of not guilty puts in issue all the material facts in the case and all the material facts alleged in the declaration. It is the only plea in replevin. In the specially concurring opinion of Justice Ethridge will be found this interesting statement:

"The general plea of not guilty puts in issue the facts on the merits; and the two pleas, not guilty and *res adjudicata*, are not properly pleaded together. The plea in bar should be heard first, and is for the decision of the court alone; whereas the decision on the merits is for the decision of the jury under the direction of the court."³¹

(3) Pleading in Equity

(a) *Intervention*

In *Shupstrine v. Natalbany Lumber Co.*³² it is said that intervention is "an interlocutory proceeding" dependent upon and subsidiary to the case between the original parties. Where the decree between the original parties is one of final dismissal, no money in court, no property in the hands of the court for disposal or distribution, and the decree does not act on any property or its title or possession, the intervention goes out with the original suit.

²⁸2 So. (2d) 347 (Miss. 1941).

²⁹190 Miss. 555, 1 So. (2d) 229 (1941).

³⁰189 Miss. 477, 198 So. 303 (1940).

³¹*Commercial Credit Co. v. Newman*, 189 Miss. 477, 490, 198 So. 303, 307 (1940).

³²189 Miss. 409, 198 So. 24 (1940).

(b) *Divorce*

In *Bonnie Joy v. Miles*³³ the clean hands doctrine is applied to a proceedings where the wife seeks to have a decree of divorce set aside. She had married another man subsequent to the rendition of the decree of divorce even though she did not know of the decree at the time of the marriage.

(c) *Discovery*

In *W. T. Rawleigh Co. v. Hester*³⁴ the court lays down the rule:

"A pleading seeking a discovery which fails to state a cause of action against any particular defendant can not be maintained even in the chancery court,—the appropriate forum for obtaining such relief in a proper case."³⁵

The court further held one is excused from making a discovery not only of that which must but even of that which may subject him to a penalty.

(d) *Demurrer*

The court held in *Shackleford v. N. Y. Underwriters Ins. Co.*³⁶ that a motion to strike a ground of demurrer is unknown to the practice in Mississippi.

(4) *Variance*

In *Arkansas Fuel Oil Co. v. Trinidad Asphalt Mfg. Co.*,³⁷ in reversing the case, the court permitted a recovery to be had under certain statutes not mentioned in or sought to be taken advantage of in the declaration and not called to the attention of the lower court. The court applied Section 5009, Mississippi Code of 1930. The danger of this departure from the rule laid down in the case of *Gulf Research Co. v. Linder*³⁸ is emphasized by this case, for if the section the higher court applied to the case had been called to the attention of the lower court, it might have developed that the provisions of Section 5976, Mississippi Code of 1930 had not been complied with; and, if *United States F. & G. Co. v. Plumbing Wholesale Co.*³⁹ is still the law, a recovery could not be had even under the section the higher court applied.

³³190 Miss. 255, 199 So. 771 (1941).

³⁴190 Miss. 329, 200 So. 250 (1941).

³⁵*W. T. Rawleigh Co. v. Hester*, 190 Miss. 329, 339, 200 So. 250, 253 (1941).

³⁶189 Miss. 396, 198 So. 31 (1940).

³⁷189 Miss. 366, 198 So. 41 (1940).

³⁸177 Miss. 123, 170 So. 646 (1936).

³⁹175 Miss. 675, 166 So. 529 (1936).

(5) Evidence

(a) *Discovery*

Often we find parties to suits seeking to use Section 1551, Mississippi Code of 1930, in a fishing expedition to enable them to bolster a weak case. In this connection the case of *Morrison v. Guaranty Mortgage & Trust Co.*⁴⁰ is of interest.

"The Section was intended, of course, to enable resident parties to a suit to take evidence of a nonresident party for use in the suit. It was not intended to enable the resident party to explore all the business affairs of his adversary."⁴¹

Just how far should a party be permitted to use this statute and when does its use become a denial of due process of law is answered in the decision by citation of relevant cases. In this case the court says the proper procedure to challenge the interrogatories and thereby secure judgment as to the relevancy and propriety of the evidence sought would be to move to suppress the interrogatories before undertaking to answer them, or else to take exceptions thereto upon the ground that the interrogatories exceeded the statutory requirement. It would be unfair and unjust as well as unlawful to require an extensive, prolonged and expensive search for evidence, unless that evidence reasonably and specifically appears to be proper and relevant. The taking of such depositions is under the control of the court.

(b) *Difficulty of Proof*

Does the fact that it will be difficult to make certain proof change the general rules of evidence as applied to such a case? Our court held not in *Nicholson v. Dent, Robinson, and Ward*.⁴²

(c) *Presumptions*

The rule that where the facts appear in proof, the presumptions as to such facts disappear, is reannounced in *Halloway v. Halloway*.⁴³

In *Outz v. Carroll*,⁴⁴ a divorce case, it is said that the law presumes, in favor of the validity of a wife's second marriage, that the former husband from whom the wife had not obtained a divorce had either obtained a divorce or was dead, even though his absence had been for a period less than seven years.

⁴⁰199 So. 110 (Miss. 1940).

⁴¹*Morrison v. Guaranty Mortgage & Trust Co.*, 199 So. 110, 115 (Miss. 1940).

⁴²189 Miss. 658, 198 So. 552 (1940).

⁴³189 Miss. 723, 198 So. 738 (1940).

⁴⁴190 Miss. 217, 199 So. 76 (1940).

(d) *Divorce*

It is only in exceptional cases that the courts in Mississippi will grant a divorce on the uncorroborated testimony of one of the parties. In the exceptional cases the proof must be closely searched and must be so clear as to convince the court that all the asserted facts are true in all essential respects.⁴⁵

(e) *Proof of Lost Record*

*Peebles v. Miles*⁴⁶ holds that where a note is filed in the justice of the peace court, and the case is appealed to the circuit court, the note being lost in the meantime, a copy can be substituted in the higher court.

(f) *Opinion*

In *Columbus & G. Ry. v. Robinson*⁴⁷ the court held it was error to permit a witness to testify that a certain place was dangerous instead of requiring the witness to state the facts as to its condition and surroundings, leaving the conclusion for the jury.

In *Metropolitan Life Ins. Co. v. Wright*⁴⁸ it is said that a question was not complete as regards a disability claim, for the question did not ask what the claimant was disabled from doing. The court held, however, that a physician might give his opinion as to the effect work would have upon a person suffering from a certain disease.

(g) *Documentary Evidence*

In *Gulf M. & O. Ry. v. Luter*⁴⁹ the court said:

"... a box full of documents presented to a court, and this includes any tribunal whose acts are subject to judicial review, is no proof at all, unless and until the party who relies thereon has made suitable tabulations or schedules thereof in a reasonably concrete, readily accessible and definite form and produces as a witness the person who made the tabulations."⁵⁰

In this short statement the court, citing cases which it will be well to review, gives the bar a rule to be followed in the introduction of this type of proof.

(h) *Tax Title*

Under the code section⁵¹ parol testimony is admissible to explain abbreviated recitals on the assessment roll and in tax deeds. However,

⁴⁵*Anderson v. Anderson*, 190 Miss. 508, 200 So. 726 (1941).

⁴⁶189 Miss. 623, 198 So. 29 (1940).

⁴⁷189 Miss. 675, 198 So. 749 (1940).

⁴⁸190 Miss. 53, 199 So. 289 (1940).

⁴⁹190 Miss. 523, 1 So. (2d) 231 (1941).

⁵⁰*Gulf M. & O. Ry. v. Luter*, 190 Miss. 523, 532, 1 So. (2d) 231, 233 (1941).

⁵¹MISS. CODE ANN. (1930) §3151.

where complainant is entitled to so aid the description, he is bound by whatever result such application of the rule may bring. And in order to warrant the introduction of such parol testimony, there must be a definite clue shown by the roll and official map, and his right must be referred to the description in the tax deed and the assessment.⁵²

(i) *Parol Proof*

*Stone v. Grenada Grocery Co.*⁵³ is to the effect that parol evidence is unavailing to vary or contradict a written instrument except in a direct proceeding in equity to reform the instrument.

(j) *Motion Pictures Used in Evidence*

In the case of *Metropolitan Life Ins. Co. v. Wright*⁵⁴ the court discussed a new question, the use of motion pictures in evidence. We invite attention to the opinion in chief as well as to the dissenting opinion. When Greenleaf wrote his celebrated treatise on evidence, the New Deal had not introduced W.P.A. and its slow motions to the courts. Hence, we ask, is Judge Smith in advance of times, or is Judge Etheridge announcing "horse and buggy law"? Chief Justice Smith says:

"Evidence by means of motion pictures exhibited to a trial jury, while novel, is admissible, when the accuracy with which they reproduce the scenes photographed is proven—somewhat like the accuracy of an ordinary photograph is proven."⁵⁵

Justice Etheridge's dissenting opinion is of value in calling attention to many factors that may enter into the proof of the accuracy of the pictures.

(6) Trial

(a) *Burden of Proof*

*City of Jackson v. McCardle's Estate*⁵⁶ is to the effect that the burden of proof is on a tax payer appealing from the decision of city commissioners assessing him with taxes. In the circuit court he has the right of opening and closing the case, but the returns of the city assessor making the assessment are held to be *prima facie* correct.

*Crabb v. Comer*⁵⁷ holds that, where no usury appears on the face of a note sued upon the burden of proof rests on the party asserting usury.

⁵²Seward v. Carter, 190 Miss. 354, 200 So. 248 (1941).

⁵³190 Miss. 555, 1 So. (2d) 229 (1941).

⁵⁴190 Miss. 53, 199 So. 289 (1940).

⁵⁵Metropolitan Life Ins. Co. v. Wright, 190 Miss. 53, 63, 199 So. 289, 291 (1940).

⁵⁶189 Miss. 781, 198 So. 736 (1940).

⁵⁷190 Miss. 289, 200 So. 133 (1941).

(b) *Instructions*

The court held in *M. & A. Motor Lines v. Villiere*⁵⁸ that the giving of an instruction at the request of a defendant precludes the defendant from assigning as error the giving of substantially the same instruction for the plaintiff. The same rule appears in *Coca Cola Co. v. Petty*.⁵⁹

In *Metropolitan Life Insurance Co. v. Wright*⁶⁰ Judge Smith seems to have dealt a death blow to the exploded, dangerous, worthless, and pernicious source of new trial, the ancient doctrine of *falsus in uno, falsus in omnibus*. So let the bar take warning and cease to trifle with this ancient rule which has been slowly wasting away until it now seems to have met its end in Mississippi. For while the court had so unkindly dealt with it in the case of *M. & A. Motor Lines v. Villiere*,⁶¹ in this case it places a wreath on the grave.

It is announced in *Kurn v. Fondren*⁶² that where a case turns on circumstantial evidence, it should rarely be taken from the jury.

In *Krouse v. Jones*⁶³ the court holds that where evidence of the plaintiff is unsubstantial, unsatisfactory and amounts only to conjecture and suspicion, a peremptory instruction should be given for the defendant.

Justice Griffith in *Jakup v. Lewis Grocery Co.*,⁶⁴ in simple and concise words, lays down the rule as to when a peremptory instruction should be given. No better rule for the final disposition of a case can be found than: "May sound and reasonable men, in a search for truth, uninfluenced by bias or improper motives, safely accept and act upon that evidence as true?"

The distinction between directing a verdict for a party and refusing to let a jury verdict stand is raised by the differing views of the judges in *Truckers Exchange Bank v. Conroy*.⁶⁵ The court said it was proper to grant the request for an instructed verdict, but Justice Ethridge dissented. Reading both the majority and the minority opinion, many things are suggested. If the trial judge and the jury accept as facts what a reasonable man, engaged in search for truth and uninfluenced by improper motives, would accept and act on, when should the reviewing court, reading the "cold record" and not faced with the living witnesses, substitute

⁵⁸190 Miss. 848, 1 So. (2d) 788 (1941).

⁵⁹190 Miss. 631, 200 So. 128 (1941).

⁶⁰190 Miss. 53, 199 So. 289 (1940).

⁶¹190 Miss. 848, 1 So. (2d) 788 (1941).

⁶²189 Miss. 739, 198 So. 727 (1940).

⁶³198 So. 552 (Miss. 1940).

⁶⁴190 Miss. 444, 200 So. 597 (1941).

⁶⁵190 Miss. 242, 199 So. 301 (1941). Upon the question of when the court may direct a verdict in Mississippi, see Note (1940) 12 MISSISSIPPI LAW JOURNAL 350.

their impression for that of the lower court? Who passes upon this question of fact—the trial judge and the trial jury or the reviewing court?

In *Kurn v. Fondren*⁶⁶ it is laid down that a defendant who, after making a motion to exclude evidence on behalf of plaintiff and renewing that motion at the conclusion of the hearing, proceeded to introduce similar evidence thereby waived objection to action of the court in refusing to exclude plaintiff's evidence.

(c) *Judgment*

The case of *Finklea v. Powell*⁶⁷ contains an interesting discussion of the problem of a defendant being sued in a foreign jurisdiction, what he should do there, and the effect of a judgment there. He may disregard the suit entirely; stay away from the jurisdiction where the suit is brought; and on attempt thereafter to propound the judgment in a court of his residence or domicile, he may then and there raise the question of whether the original court had jurisdiction or not. On the other hand he may appear specially in any jurisdiction where a special appearance is allowed and challenge the jurisdiction of the court, proceed on the merits if the question of jurisdiction is found against him, and appeal. But if he takes the second course, he is bound, in the absence of fraud, by the decision of that court and can not have the question reviewed collaterally when sued in the court of his residence or domicile. When he submits the question of jurisdiction and further submits the question on the merits to the foreign court he is bound by its decision, and his only recourse is by appeal to the reviewing courts of that state. This reasoning is followed in *Cudahy Packing Co. v. Smith*.⁶⁸

(d) *Motion for New Trial*

That questions whether the verdict was against the overwhelming weight of the evidence, not raised in the trial court by motion for new trial, can not be considered on appeal, is held in a criminal case, *Cunningham v. State*.⁶⁹ The rule applies to civil cases as well.

(e) *Notice to Reporter to Transcribe Notes*

In *Redmond v. Hillard*⁷⁰ the court calls attention to the necessity of giving notice to the reporter to transcribe notes within the time specified by law and *after* final judgment.

⁶⁶189 Miss. 739, 198 So. 727 (1940).

⁶⁷189 Miss. 454, 198 So. 293 (1940).

⁶⁸2 So. (2d) 347 (Miss. 1941).

⁶⁹200 So. 248 (Miss. 1941).

⁷⁰190 Miss. 839, 200 So. 130 (1940).

(7) Remedies

(a) *Attachment and Garnishment*

In *Craig, Tax Collector v. Barber*⁷¹ the court held that attachment and garnishment may be incorporated in the same writ; and, where so incorporated, the quashing of the writ of garnishment does not of itself discharge the attachment.

(b) *Mandamus and Injunction*

In *Madison County v. Mississippi State Highway Department*⁷² will be found a very interesting discussion of the distinction between injunctions and mandamus proceedings. Another case, *Morris v. Robertson*,⁷³ is more particularly devoted to a discussion of mandamus proceedings. From these cases it would appear that, while the writ of mandamus is a remedy at law, the right to relief under it is governed by equitable principles. Mandamus is strictly a legal remedy and a remedy to compel action while injunction is a remedy to prevent action.

(c) *Ne Exeat*

The old, but seldom used, writ of *ne exeat* is most interestingly discussed in both the majority and the dissenting opinions in the case of *Johnson v. Johnson*.⁷⁴ As this remedy can be so effectively used in the enforcement of rights in divorce proceedings, the attention of bench and bar is called to this case. It is urged that both opinions be read and considered in the hope that the writ may be availed of in the enforcement of decrees in divorce cases.

VI.

PROPERTY

*Warner Beard, Jr.**

A. EMINENT DOMAIN

By an eminent domain proceeding the highway commission sought to condemn a strip of land through a farm for the construction of a highway.¹ The court, in overruling a suggestion of error, withdrew that opinion and substituted the opinion contained in *Mississippi State High-*

⁷¹190 Miss. 182, 199 So. 270 (1941).

⁷²198 So. 284 (Miss. 1940).

⁷³189 Miss. 592, 198 So. 290 (1940).

⁷⁴189 Miss. 561, 198 So. 308 (1940).

*Member Mississippi and Jones County Bars; Laurel, Mississippi.

¹Mississippi State Highway Comm. v. Hillman, 199 So. 679 (Miss. 1940).

way *Comm. v. Hillman*.² Under Section 17, Mississippi Constitution of 1890, "due compensation" is made the owner when he is paid a value measured by the difference between the fair market value of the whole tract immediately before the taking and the fair market value of that remaining after the taking of the part condemned, without considering general benefits or injuries which are shared by the general public resulting from the new use of the land. The time honored adage, "Each tub must rest upon its own bottom," is not dispensed with by the above stated formula. Whether the formula is applicable in a particular case depends upon its facts. The case here, simply because of specific items of damage, inconvenience, and injury to the owner was not taken out from under the "before and after" rule. The owner could not recover for specific items as separate elements of damage as such. Proof of such items was admissible only as evidence bearing upon the market value of the remaining land after the taking.

The highway commission sought to condemn an easement only over Dantzler's lots in the case of *Mississippi State Highway Comm. v. Dantzler*.³ The easement was for highway improvement. It was apparent that the commission and the owner could not agree upon a price before the institution of suit. And in the suit the owner raised the point that the commission must take the fee and pay for same, since the statute does not authorize the condemnation of an easement only, the price for which would be smaller. This question is discussed by the Chief Justice in a dissenting opinion. The majority opinion held that the condemnor is not required to go to the full extent of the law in taking property but may restrict itself to so much of the owner's interest therein as the public need actually requires. The damage should be related in such case to the interest or use reserved to the owner. The court recognized the broad view that the owner could make a valid deed, and the commission could accept it with any number of reservations in it; and any reservation the commission could lawfully allow in a deed, it could allow and stipulate in its petition for condemnation. And, when so stipulated, the terms are as binding on the commission as if the same had been contained in a deed from the owner.

In addition to the question presented in the *Dantzler* case, *supra* and in the *Hillman* case, *supra* the court held in *Rand v. Mississippi State Highway Comm.*⁴ that neutral strips between lanes on heavily traveled highways and parking bays for stops were so manifestly an incident to

²189 Miss. 850, 198 So. 565 (1940).

³190 Miss. 137, 199 So. 367 (1941).

⁴199 So. 374 (Miss. 1941).

greater public safety that the commission has the authority to condemn land to be used in that manner.

B. HOMESTEAD

The owner of the land involved in *Bank of Cruger v. Hodge*⁵ occupied the same with her husband and daughters as a homestead in the year 1932. In that year, they were obliged to remove to a neighboring county where the husband had obtained employment. The husband continued in various employments until July of 1939. In October, 1937, a judgment was rendered in favor of the bank against the owner of the land and against her husband. An execution having been issued under this judgment, the land was advertised by the sheriff to be sold on the first day of June, 1939. A day or two before the date of the sale the owner moved some of her furniture into the house on the land in question, and thereafter she and one of her daughters spent two or three nights during each week-end in this house. The court decided the question raised by the claim for exemption as provided by Section 1765, Mississippi Code of 1930, on the facts. The contention of the owner, that she had never abandoned her homestead, but that her removal was temporary, was a point seized upon in the dissenting opinion. However, the majority opinion held that the removal of a family from lands in order to enable the husband to obtain employment, after being unable to secure advances necessary to finance a crop, was an "abandonment" of the homestead—this, notwithstanding the intention to return after making enough money to buy farm equipment, where seven years elapsed; and it did not appear when, if ever, there would be enough money to finance the farm.

C. EXEMPTIONS

A World War veteran's widow qualified as administratrix of the veteran's estate, which estate was composed of proceeds of war risk insurance and adjusted compensation. The administratrix defaulted and the veteran's children brought this suit.⁶ The question presented was whether, assuming that the entire estate received by the administratrix was exempt property, it constituted a part of the "estate to be administered" for the improper use or loss of which the administratrix's surety may be liable. The adjusted compensation, though payable to the estate instead of to a named beneficiary, was exempt.⁷ The war risk insurance proceeds, regardless of whether exempt under 38 U. S. C. A. Section 454 a, as to which there is some contrariety of opinion, are exempt under Section 1757, Mississippi Code of 1930. The controlling consideration is the fact that

⁵189 Miss. 356, 198 So. 26 (1940).

these funds were payable by the United States to only a qualified administratrix, thereby making the administratrix's custody official rather than officious, for the proceeds would not have been paid except for such qualification. A surety upon the administratrix's bond executed for the purpose of collecting funds, even if the funds are exempt from debts including those of last illness and funeral expense, is liable to the distributees for misapplication by the principal.

D. DEEDS

(1) Delivery

In *Ladner v. Moran*⁸ husband and wife occupied the homestead in 1931. During that year the wife signed and acknowledged a deed to the homestead and deposited it with her bank under the condition that the bank deliver the deed to no one except the wife unless before calling for it she should die. In that case, after her death, it was to be delivered to the grantee therein named. The bank gave the grantor a receipt for the instrument so placed in its hands. The husband, who did not sign the deed, died in 1933. Just prior to the death of the wife in 1935, she gave the grantee named in the deed the receipt furnished her by the bank. At the same time she employed the language, "Take this card and go get your deed at the bank," or words to that effect. The lower court's holding, that the delivery of the receipt, under the circumstances mentioned, constituted delivery of the deed, was affirmed and title passed to grantee at that time.⁹

(2) Reservations

The Federal Land Bank, in *Federal Land Bank of New Orleans v. Cooper*,¹⁰ conveyed land to Cooper by deed which recited: "One half interest in all minerals is reserved to grantor." While there is a distinction between a reservation and an exception, the terms are commonly used interchangeably. The intent must be determined by reference to the subject matter and surrounding circumstances. An exception excludes some part of the title which remains in the grantor by virtue of his original title, while a reservation creates a new right out of the subject of the grant and is originated by the conveyance. The quoted recital was measured by the components of a "good exception" as laid down in *Moore v. Lord*¹¹ and was found to be a valid exception within the rule.

⁸Hill v. Ouzts, 190 Miss. 341, 200 So. 254 (1941).

⁷43 STAT. 125 (1924), 38 U. S. C. A. §618 (1934).

⁸190 Miss. 826, 1 So. (2d) 781 (1941).

⁹See also Barner v. Lehr, 190 Miss. 77, 199 So. 273 (1940).

¹⁰190 Miss. 490, 200 So. 729 (1941).

¹¹50 Miss. 229 (1874).

E. LEASES

In the case of *Senter v. Propst*¹² a sub-lease, in order to avoid his obligations under a sub-lease, surrendered the leased property to the original lessor without so informing the original lessee. The lessor had declared a forfeiture under a forfeiture clause in the lease. This clause provided that lessee's default in the payment of the rental, and the giving of written notice, shall render the contract inoperative and void and confer upon the lessor the right to immediately take possession of the property. The sub-lessee assisted in the consummation of a new lease between the original lessor and a third party. The court declared the sub-lessee's surrender of the leased premises was not a valid "eviction" of the original lessee, but constituted a legal fraud.

F. MORTGAGES

(1) Chattels

A local citizen sued out a foreign attachment against a truck.¹³ A non-resident holder of a chattel mortgage recorded in a foreign state, but which had not been "delivered to the proper clerk in this state for record" as provided by Section 2149, Mississippi Code of 1930, claimed the truck. It was held that the holder of the mortgage has the prior right when it has been established that the truck made only occasional trips into this state. The crossing of the state line from without on business errands does not constitute "removal" requiring a re-recording of the instrument.

(2) Land

Perry County Bank held a past due note secured by a deed of trust upon lands, timber thereon being excepted. Guaranty Bank held a deed of trust on the timber. It was agreed between the mortgagees, as appears in *Albritton v. Williams*,¹⁴ that, in consideration of an extension of the past due indebtedness, Perry County Bank should get a first mortgage on both land and timber¹⁵ under a new deed of trust and Guaranty Bank should get a second mortgage on the land and timber. In the new deed of trust there was nothing said about the timber reserved in the former

¹²190 Miss. 190, 197 So. 100 (1940).

¹³*Russum v. Gans*, 190 Miss. 584, 1 So. (2d) 235 (1941).

¹⁴198 So. 573 (Miss. 1940).

¹⁵An agreement to extend time for the payment of a mortgage debt must be supported by sufficient consideration. See *Hattiesburg Production Credit Association v. Smith*, 1 So. (2d) 768 (Miss. 1941) in which it was held that a partial payment of the amount named in a contract after such payment is due is not sufficient "consideration" for an agreement of the creditor to extend the time for payment of the balance owing under the contract because such payment is merely a partial performance of a duty already existing. In *Albritton v. Williams*, 198 So. 573 (Miss. 1940) the timber was included in the new deed of trust to support the agreement for the extended time.

deed of trust to Perry County Bank, although it was stated therein that it was an extension and renewal of the first deed of trust. The court held that the Perry County Bank's new deed of trust did not specifically mention timber as an exception; and since timber is part of the land upon which it stands, Perry County Bank held a first lien on both the land and the timber.¹⁶

G. ADVERSE POSSESSION

The burden of proof in *Elmer v. Holmes*¹⁷ was upon Mrs. Elmer to establish: (1) a parol gift of land from her father-in-law, (2) adverse possession by her as against her father-in-law during his life time and continuing after his death as against the heirs at law, her husband being such an heir, and (3) the fact that the period of limitation had fully run. This burden she failed to meet; and the settled rule, that a parol gift of land, where the donee goes into possession, accompanied by ten years adverse possession, will vest title in the donee, could not be brought to complainant's aid under the facts. Mrs. Elmer was not a competent witness in propounding this claim against the estate of the deceased father-in-law.

In *Barner v. Lehr*¹⁸ a husband farmed a tract of land belonging to his wife. The wife died without issue, leaving complainants as her heirs at law. Defendants claimed title to the land involved through a will made by the husband, which they asked the court to "reform" so as to include the description of the lands involved. The lands in controversy, the defendants claimed, belonged to the husband by an unrecorded and lost deed and by adverse possession. The court was of the opinion that the possession and use of the land by the husband was insufficient to establish title by adverse possession. In the absence of a hostile claim the husband was the agent of the wife, and they were both in possession. Two other observations were made by the court. (1) Where a will, like a deed, disposes of property by a definite description, parol evidence is not admissible to contradict or vary the description; further, equity will not reform a will or write a will for the decedent. (2) Persons asserting the delivery of a deed have the burden of proof, and there is no presumption that the handling of a deed to a third person without more is a delivery to the grantee.¹⁹

In the same case the court used the following language: "In this State, it may well be doubted that where husband and wife occupied lands

¹⁶For a definition of "Exception" see *Federal Land Bank of New Orleans v. Cooper*, 190 Miss. 490, 200 So. 729 (1941).

¹⁷189 Miss. 785, 199 So. 84 (1940).

¹⁸190 Miss. 77, 199 So. 273 (1941).

¹⁹In connection with this latter observation see *Ladner v. Moran*, 190 Miss. 826, 1 So. (2d) 781 (1941). In connection with the first observation see *Seward v. Carter*, 190 Miss. 354, 200 So. 248 (1941).

as a homestead, in joint occupancy, that either the one or the other could acquire title by adverse possession.”²⁰ In *Lincoln v. Mills*²¹ the doubt above expressed seems to have been settled; for here it was held the evidence established that the wife did obtain by adverse possession, as against her husband, title to the land on which the parties resided as a homestead. A ninety-nine year lease renewable forever in favor of the husband expired. Thereafter the wife secured a lease from the successors of the original lessor. This renewal lease furnished sufficient color of title, which, when considered with the acts of ownership, gave the wife a paramount title by adverse possession not only against the husband but also against all creditors and lienors claiming through him. The title in the wife was not a derivative title but an independent paramount title.

Appellant in *Sheppard v. Cox*²² asserted title under a commissioner’s deed dated in November, 1890. The appellee asserted title under a tax deed dated in March, 1890. Appellant, on the facts, established his claim by adverse possession even though he had no knowledge of the legal description of the land he occupied. Actual possession of only a part of the land, whether the legal description thereto is known or not, if under color of title, is constructive possession of all the land embraced within the calls of the instrument giving color of title. Title thus established is a superior title unless there are conflicting claims by one who holds a superior paper title and who asserts such ownership as amounts to adverse possession of a part of such land.

H. WILLS

*Gordon v. Gordon*²³ concerns the construction of a will. The testatrix, Mrs. Joanna Gordon, devised property, “To my son Charles . . . for life, and after death to his wife, Mary F. Gordon, for life, with remainder to the heirs of the body of said Charles . . . and in default of them to his brother (William) and sister (Margaret) or the heirs of his brother and sister. The estate hereby given to the said Mary F. Gordon is a life estate after the death of said Charles. . . .” After the testatrix’s death, William and Margaret quit-claimed their interest to Charles. Charles thereafter deeded his interest to Mary. Charles and William died. Charles left no heirs. William left his widow and one son, the appellant. Mary sued to cancel William’s claim to the property. In construing the will, appellant took as a purchaser under the will rather than as an heir of William and appellant has a contingent interest which will come into play in the event

²⁰See also the full text of the opinion in *Barner v. Lehr*, 190 Miss. 77, 199 So. 273 (1940).

²¹2 So. (2d) 809 (Miss. 1941).

²²1 So. (2d) 495 (Miss. 1941).

²³189 Miss. 729, 198 So. 287 (1940).

he is living at the time of Mary's death. Since his interest is that of a purchaser rather than as an heir of his deceased father William, such a real interest recognized by the law was unaffected by the father's quit-claim deed.

In *Boxlet v. Jackson*²⁴ the testator devised an undivided one-half share in realty to his son for life and provided that immediately after the son's death, "I give and devise said part, share and portion of and in said land to the heirs of the body of my said son in fee simple." The son died without heirs of his body. The son's widow claimed the son's share upon the theory that he was vested with a fee simple title. The heirs of the testator claimed title upon the theory that in default of heirs of the body and in the absence of a residuary legatee, the remainder became a lapsed devise and reverted to the testator's heirs. A learned discussion of the rule in *Shelley's* case was contributed to legal literature on the subject. There resulted a holding that "heirs of the body" described a fee tail estate, "in fee simple" an absolute estate. Therefore, it was clear that the testator intended to devise to his son a life estate with remainder after his death to the heirs of his body in fee simple, should he have such heirs. The son had no such heirs, and this devise lapsed and reverted to the heirs of the testator.

An undivided interest in realty was bequeathed to a trustee for a *non compos mentis* in the case of *Beard v. Rosenzweig*.²⁵ The trustee was vested with the power to sell the said interest or any part thereof for the support of the ward, remainder, if any, to descend to the heirs at law of the *non compos mentis*. In a partition suit by the tenants in common of the *non compos mentis*, it being admitted that the property was not subject to partition in kind, the tenants in common were entitled to sale of the realty in its entirety. The court held that the bequest to the trustee did not merely convey a "life estate", for under the terms of the will it was not required that there should be a remainder.

In June of 1926 the testatrix executed a deed in favor of the mayor and aldermen of Vicksburg conveying the property involved in the case of *Ricks v. Bank*.²⁶ The deed contained the following provision: "... for use solely as a site for a public school . . . and with the understanding, and subject to the condition, that if grantee shall not, within the period of ten years . . . erect on said land for use as a public school . . . a building . . . the title to said land shall, ipso facto, . . . revert to and become revested in me." No such building was erected within the time limitation.

²⁴2 So. (2d) 160 (Miss. 1941).

²⁵190 Miss. 325, 200 So. 261 (1941).

²⁶2 So. (2d) 344, 345 (Miss. 1941).

Testatrix, grantor in the aforesaid deed, died in 1931, leaving a will by which all her property, real and personal, after specific legacies and debts were paid, went to a residuary legatee. The question is whether the heirs at law inherited, after the death of the testatrix, the possibility of reverter created by the deed or whether the same passed at her death under the will in favor of the residuary legatee. Under Section 3550, Mississippi Code of 1930, granting power "to devise all estate, right, title, and interest in possession, reversion, or remainder. . . .", the common law rule was abrogated. And "reversion" is not to be used in its restricted sense. Thus by judicial interpretation "reversion" would include the possibility of reverter which would mature into an estate upon the happening of an uncertain future contingency.

In *Old Ladies Home Association v. Grubbs' Estate*²⁷ the court adhered to the strict principles of *Blackbourn v. Tucker*,²⁸ holding that mortmain restrictions are applicable to devises made direct to charitable corporations as well as to trustees for such corporations. Such restrictions are not applicable, however, to the state. Devises to the University of Mississippi, Mississippi State College, and the Mississippi State College for Women were upheld on the ground that the right of the sovereignty to take property was not affected by the mortmain laws.²⁹

Under the will, which the court was asked to construe in *Hathaway v. North*,³⁰ the testatrix bequeathed her home to North and his wife, to be turned over to them "when all demands against the estate have been paid." The demands were to be paid out of the rents derived from the property. North predeceased the testatrix and there was no residuary legatee named in the will. Just who were the heirs of the testatrix was shown by statements made by testatrix to the executrix and other close personal friends. This evidence was competent. While the will did not create an express trust pending the payment of all debts and demands against the estate, it does provide for the postponement of the rights of North and his wife to have the property turned over to them. The heirs have the right to pay off the remaining indebtednesses and have the property sold with partition of the proceeds to be made between the heirs and the wife of North, or they are entitled to a sale of the property with direction to the commissioner to pay over to the administratrix the net proceeds in order that the remaining indebtednesses might be paid by the administratrix.

²⁷199 So. 287 (Miss. 1941), *sugg. err. overr.*, 2 So. (2d) 593 (Miss. 1941).

²⁸72 Miss. 735, 17 So. 737 (1895).

²⁹*Coleman v. Whipple*, 2 So. (2d) 556 (Miss. 1941).

³⁰190 Miss. 697, 1 So. (2d) 490 (1941).

I. MISCELLANEOUS

Some doubt is expressed in Section 157 of Griffith's *Chancery Practice* as to whether venue can be waived in confirmation of title and cloud suits. In *Ravesies v. Martin*³¹ it was held that a suit to cancel a claim against land as a cloud upon the title, where the property is in possession of the complainant and the court is not asked to make any disposition thereof, should not be held to be a proceeding purely *in rem* in the sense that a court would be wholly without jurisdiction in a county other than that where the land is situated. Such suits are quasi *in rem* at most.

In connection with this case it might be interesting to read *McLendon v. McGee*,³² a suit to cancel a cloud on title, wherein it was held that it is only necessary to join as defendants those parties who are asserting an adverse claim to the land or who are holding such recorded evidence of title as should be cancelled to remove any cloud, doubt, or suspicion as to ownership of true title.

VII.

PUBLIC LAW

*Pat D. Holcomb**

A. CARRIERS

The case of *Dixie Greyhound Lines, Inc. v. Mississippi Public Service Comm.*¹ and the opinion on the suggestion of error² involved the construction of Section 10, Chapter 139, Mississippi Laws of 1938 and certain pertinent provisions of Chapter 142, Mississippi Laws of 1938, cited as the "Mississippi Motor Carriers Regulatory Act of 1938."

The facts of the case are as follows: R. P. Cox, operating as Cox Motor Coaches, applied for a certificate of public convenience and necessity before the Public Service Commission for a permit authorizing it to operate a motor transportation service over a route served by the Dixie Greyhound Lines, which application was opposed by the latter. The commission granted the certificate to Cox over the lines served by the Dixie Greyhound Lines, and from said order the Dixie Greyhound Lines appealed to the Circuit Court of Hinds County, and from an affirmance there the cause was appealed to the Supreme Court.

The appeal involved the decision of three questions: "(1) Whether or not the order or judgment of the Public Service

³¹190 Miss. 92, 199 So. 292 (1940).

³²189 Miss. 712, 198 So. 725 (1940).

*Member Mississippi and Coahoma County Bars; Clarksdale, Mississippi.

¹190 Miss. 704, 200 So. 579 (1941), *sugg. err. overr.*, 190 Miss. 704, 712, 1 So. (2d) 489 (1941).

²190 Miss. 704, 712, 1 So. (2d) 489 (1941).

Commission appealed from herein, is subject to judicial review; (2) "The extent to which a judicial review is limited if the power exists;" (3) Whether there is substantial (that is, more than a scintilla of) evidence to support the judgment of the commission, or, as stated in many reported cases, whether the order or judgment is manifestly against the evidence, if the courts are entitled to review the action of the commission complained of, whereby it has granted certificates of public convenience and necessity in this case to an additional motor carrier of passengers, mail and light express over portions of a route being served by the existing carrier, the Dixie Greyhound Lines, Incorporated."³

In determining the above questions, the court held: "That a court of competent jurisdiction has the power to review any order made by an administrative commission to determine whether it is supported by substantial evidence, within the meaning of that term, as hereinbefore defined, or is purely arbitrary and capricious, beyond the power of the commission to make, or violates some statutory or constitutional right of an interested party, is so well settled as not to be open to any doubt."⁴

Secondly, the court held that the only limitation upon the power of judicial review is whether the commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. That question, the court said, must be determined upon the evidence produced before the commission.

Having then determined, first, the power and extent of judicial review, the court was confronted with the question of whether or not there was substantial evidence presented by the record to support the judgment of the commission.

The court on the facts of this particular record held that there was no substantial proof of public convenience or necessity to sustain the granting of such certificate to the applicant, R. P. Cox, over the route being served by the Dixie Greyhound Lines from Tchula, Mississippi, to Greenwood, Mississippi. The court reversed and dismissed the application as to that portion. However, the judgment of the commission in granting the certificate to Cox from Pickens to Greenwood was affirmed.

The court further held that the evidence fully justified the finding of the commission that public convenience and necessity required the granting of the certificate over the proposed route from Drew to Clarksdale, under closed-door operations between Ruleville and Drew.

³Dixie Greyhound Lines, Inc. v. Mississippi Public Service Comm., 190 Miss. 704, 712, 200 So. 579 (1941).

⁴*Id.* at 713, 200 So. at 580 (1941).

On the suggestion of error, it was held that the commission has full authority to require coordination of schedules and that an applicant cannot arbitrarily create a situation and thereupon seek an advantage as a result thereof. And when the commission so permits, its actions become by way of adoption an arbitrary exercise of its powers which is reviewable by the courts.

The foregoing opinion announces no new or far-reaching doctrine, but simply construes Section 10, Chapter 139, and Section 28, Chapter 142, Mississippi Laws of 1938 in the light of the new procedure outlined in said acts. The opinion follows the doctrine announced in most of the state courts, United States Supreme Court, federal, circuit and state appellate courts.

By virtue of the decision in the above case determining the power and extent of judicial review, the court in the subsequent cases had only to review the record to ascertain whether or not the finding of the commission was supported by legal evidence under applicable rules of law.

Magee Truck Lines, Inc. v. Bond,⁵ decided on the same day as the *Dixie Greyhound Lines* case, *supra*, involved the sole question as to whether or not there was substantial evidence to support the finding of the commission to the effect that Bond Motor Lines was in fact engaged in a *bona fide* operation as a common carrier of freight and other commodities over a route which was served by the Magee Truck Lines on January 1, 1938. Further, whether the Bond Motor Lines had so operated since that time and until the application was filed by the Bond Motor Lines on November 5, 1938, seeking a certificate of public convenience and necessity under Section 8, Chapter 142, Mississippi Laws of 1938, which is colloquially referred to as the "grandfather clause."

After reviewing the evidence before the Public Service Commission as presented by the record, Justice McGehee said:

"Therefore, instead of the evidence disclosing that the appellee was engaged in a *bona fide* operation over the route on January 1, 1938, and continuously thereafter, it clearly shows without dispute that he was not so engaged. No presumption which the law indulges in favor of the correctness of the Commission's finding will supply the lack of evidence. The judgment appealed from must therefore be reversed and the application dismissed."⁶

*Gulf M. & O. R. R. v. Luter Motor Express*⁷ is likewise a case dealing with the interpretation of the "grandfather clause." The appellants

⁵190 Miss. 428, 200 So. 586 (1941).

⁶McGee Truck Lines, Inc. v. Bond, 190 Miss. 428, 435, 200 So. 586, 587 (1941).

⁷190 Miss. 523, 1 So. (2d) 231 (1941).

argued that the applicant was not in *bona fide* operation on January 1, 1938. The court then was called upon for the first time to construe "*bona fide* operations." After setting forth a general definition of the term, the court held that appellee on January 1, 1938, was a restricted carrier and that one who was operating on said date as a restricted carrier could not avail himself of the "grandfather" proviso to obtain a certificate of convenience and necessity as a general common carrier.

However, the court further held that under the evidence presented by the record that the order of the commission was too broad and that under Section 28, Chapter 142, Mississippi Laws of 1938 the court is authorized to enter such order as may be right and just. The court, therefore, did not attempt to enter a modified order but concluded rather that it would be right and just to reverse the order of the commission with directions that the matter be remanded to the commission that such order might be rendered as would be proper within the principles announced and as would be upon more definite proof.

The sum total and effect of the above cases seems to be simply that the Public Service Commission is in its nature an inferior tribunal of limited jurisdiction to hear and determine matters affecting common carriers and public service corporations. The rules of practice and procedure, including the right of appeal, follow the regular and orthodox channels of procedure and construction.

B. CONSTITUTIONAL LAW

Lee v. Smith,⁸ involves the construction of Chapter 196, Mississippi Laws of 1934, and Chapter 383, Laws of Extraordinary Session of 1932.

Appellant acquired certain property under a forfeited tax land patent from the state. The land had been acquired by the state through a sheriff's sale on September 18, 1933, for the taxes due thereon for the year 1932. The sale was admittedly void and was made under Section 3249, Mississippi Code of 1930, and Section 9, Chapter 383 of the Extraordinary Session of 1932. There was a three year period of redemption. The appellee claimed the land under a conveyance from the owner. He resisted appellant's action to confirm title under the theory that Chapter 196, Mississippi Laws of 1934, providing a two year limitation period within which an action might be brought to cancel the title of the state or its patentees, was unconstitutional because it was in conflict with the three year right of redemption, acting to curtail that redemption period.

The Supreme Court made the pertinent observation that a statute "may be constitutional and in operation with respect to some persons and states of facts and unconstitutional as to others."

⁸189 Miss. 636, 198 So. 296 (1940).

The court further held that Section 3, Chapter 196, Mississippi Laws of 1934, did not and could not have deprived the owner of the right of redemption during a period of three years. The right of the owner to redeem from the tax sale was unaffected thereby, and the title under the sale was vested in the state and its patentees, subject only to the right of any person interested in the land to redeem it from the tax sale. The court said:

"The constitutional defect in Section 3 of Chapter 196, Laws of 1934, as applied to the facts of this case, does not render it wholly void, or to express it more aptly, wholly inapplicable here; but simply requires that its operation be so restricted as to preserve the right of redemption that existed when the land was sold for taxes."⁹

The reasoning and result of the above opinion is certainly practicable.

*Saucier v. Life & Casualty Ins. Co.*¹⁰ involves the constitutionality of Section 5196, Mississippi Code of 1930, as applied to the following facts, copied from the opinion of the court:

"This is an action by the appellant on a life insurance policy in which she is the beneficiary, issued by the appellee to her deceased husband, Antione J. Saucier.

"At the close of the appellant's evidence, the court sustained a motion by the appellee to exclude it, and thereafter directed the jury to return the verdict for the appellee, which was done, and there was a judgment accordingly.

"It appears from the record, and the appellant's evidence, that the policy provides that it 'shall not take effect until the first premium shall have been paid in cash, and this contract delivered and accepted during the lifetime and good health of the insured. . . . Only the President, Vice-President, Secretary, Assistant Secretary, Actuary, or Treasurer has power on behalf of the Company to make or modify this contract.' Latimer, a soliciting agent for the appellee, obtained from Saucier a written application for the issuance of the policy, which application recites that 'It is understood and agreed: . . . 2. That no agent, medical examiner or any other person, except the officers of the Company, have power on behalf of the Company: (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder. . . . 4. That the Company shall incur no liability under this application until it has been received, approved, and policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the applicant. . . .'

⁹Lee v. Smith, 189 Miss. 636, 648, 198 So. 296, 298 (1940).

¹⁰189 Miss. 693, 198 So. 625 (1940).

"The policy was delivered by Latimer to the appellant. According to her evidence, she did not have sufficient money with which to pay the initial premium on the policy, and told him 'to come back later that evening,' and he said 'Here is your policy, if anything happens to your husband today or tomorrow, your policy is in force.' Latimer did not return for the collection of the premium, and Antoine Saucier died the next day without the premium having been paid. The appellee denied liability on the policy and this suit was brought by the appellant for its collection."¹¹

It will be noticed from the facts of the case that under the terms of the policy and the application therefor Latimer was not authorized to waive the advance payments of the initial premium when delivering the policy, unless Section 5196, Mississippi Code of 1930, (which must be read for an understanding of the case) which was invoked by the appellant, increased his authority in this connection and conferred on him when delivering the policy all the powers the appellee had itself in this connection; in other words, raised him *pro hac vice* from a special to a general agent.

The court held that to so construe the statute would violate the provisions of Section 14 of our constitution and the 14th amendment to the federal constitution, saying:

"The word 'liberty' as used in these sections of the two constitutions includes liberty of contract and the liberty of contract guaranteed by them is freedom from arbitrary or unreasonable restraint. In order for a statute to survive when confronted with due process of law, it must not appear to be arbitrary or capricious, but must have a reasonable relation to a legitimate end. To raise an insurance company's special agent with limited powers, into its general agent when acting for it in the particulars specified in the statute, with authority to then make material changes in a policy of insurance, issued by the company, manifestly has no relation to the end or object for the accomplishment of which this statute was enacted, or to any other imaginable legitimate legislative end."¹²

This opinion clarifies a discrepancy existing in this state on the proper construction to be placed on Section 5196, Mississippi Code of 1930. It overrules the former line of decisions, all of which were virtually in direct conflict with the law herein announced.¹³

¹¹Saucier v. Life & Casualty Ins. Co., 189 Miss. 693, 698, 198 So. 625, 626 (1940).

¹²*Id.* at 698, 198 So. at 629.

¹³Capital Paint & Glass Co. v. St. Paul Mercury Ind. Co., 180 Miss. 341, 176 So. 729 (1937); Interstate Life & Accident Ins. Co. v. Ruble, 160 Miss. 206, 133 So. 223 (1931); Lamar Life Ins. Co. v. Kemp, 154 Miss. 890, 124 So. 62 (1929); Mutual Life Ins. Co. v. Vaughan, 125 Miss. 369, 88 So. 11 (1921).

It appears to the writer that this decision certainly places a more just and reasonable construction on Section 5196, Mississippi Code of 1930, than heretofore has been announced.

*Chance v. Mississippi State Textbook Rating and Purchasing Board*¹⁴ involves the constitutionality of Section 23, Chapter 202, Mississippi Laws of 1940, which provision of said act permits the loaning of free school books to pupils in the elementary grades of all schools, whether public or private, which maintain elementary educational standards equivalent to the standards established by the State Department of Education for state elementary schools.

The contention leads directly to the inquiry whether the appropriation under Chapter 18, Mississippi Laws of 1940, constituting a textbook fund is (1) a part of the school or other educational funds of this state; (2) whether compliance with Section 23 results in placing the control of any part of the school or other educational funds of the state in the hands of any religious or other sect or sects; and (3) whether such funds have been appropriated toward the support of any sectarian school.

It was contended by appellants that Sections 18, 201, 208 and 258 of the Mississippi Constitution of 1890 were violated. In upholding the constitutionality of the act, the court adopted a balanced and sensible view of the act and its relation to the citizens as a component unit of the State:

"The State is under duty to ignore the child's creed, but not its need. It cannot control what one child may think, but it can and must do all its can to teach the child how to think. The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all."¹⁵

*Standard Oil Co. Inc. v. Stone, Chairman of State Tax Comm.*¹⁶ involves the constitutionality of Section 9, Chapter 119, Mississippi Laws of 1934, as amended by Section 7, Chapter 113, Mississippi Laws of 1938, known as the "sales tax law." It was claimed by appellant that it was deprived of its property without due process of law in making lessor's property subject to 2% sales taxes due by the lessee.

The pertinent part of the above decision deals with the constitutionality of the act declaring a lien on the permanent fixtures of the lessor when the products sold by the lessee are exclusive products of lessor. The appellant contended that such provision was discriminatory and dealt solely with filling stations.

¹⁴190 Miss. 453, 200 So. 706 (1941).

¹⁵*Chance v. Mississippi State Textbook Rating & Purchasing Board*, 190 Miss. 453, 467, 200 So. 706, 710 (1941).

¹⁶2 So. (2d) 155 (Miss. 1941).

The court held:

"The rule is announced in 6 R. C. L. 384 that 'the question of classification is primarily for the legislature and it can never become a judicial question except for the purpose of determining, in any given situation, whether the legislative action is clearly unreasonable. . . . When the classification in law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. The courts cannot require the legislature to specify its reasons for the classification, but they will always presume that the legislature acted on legitimate grounds of distinction, if such grounds exist.' It was held in the case of *Russell Inv. Corp. v. Russell*, 182 Miss. 385, 178 So. 515, 182 So. 102, 107, that: 'One who assails the classification in a statute must carry the burden of showing that it does not rest on any reasonable basis.'"¹⁷

Then it was pointed out that the owner of the premises is given the right to recover by proper action any amounts improperly paid with interest as provided in Section 8, Chapter 113, Mississippi Laws of 1938. Further, it was pointed out that the lessor might provide in his lease contract for the right of inspection of lessee's books and records and stipulate that lessee keep on hand at any and all times a sufficient amount of paid-for products out of which the tax might be collected.

Written notice by registered mail is required to be given the taxpayer, who shall have ten days to make the return and who shall have a hearing before the commission if the commission's return is incorrect.¹⁸

"Therefore, in determining the constitutionality of the amendment contained in Section 7 of this Act, the statute should be construed as a whole so as to uphold its constitutionality if possible to do so. When this is done, it would seem that the statute would entitle the lessor of the premises and fixtures to petition for a hearing if desired upon receipt by him of a demand from the commissioner to pay the delinquent taxes due by the lessee since he should succeed to the rights of the delinquent taxpayer in that behalf if his property is to be made subject to seizure and sale for the taxes due by the person making the sales. And, according to the declaration in this case, a notice and demand was given by the commissioner to the owner of the premises for the payment of the taxes in question, and it is not alleged that any hearing before the commissioner was requested and denied prior to the payment of the tax and the institution of this suit for the recovery thereof."¹⁹

¹⁷*Standard Oil Co. v. Stone*, Chairman State Tax Comm., 2 So. (2d) 155, 157 (Miss. 1941).

¹⁸Miss. Laws 1938, c. 113, §6.

¹⁹*Standard Oil Co. v. Stone*, Chairman State Tax Comm., 2 So. (2d) 155, 159 (Miss. 1941).

C. COUNTIES AND STATES

In the case of *Love v. Humphreys County*,²⁰ the Board of Supervisors of Humphreys County, acting in pursuance of the authority of Chapter 142, Mississippi Laws of 1934, entered an order at its regular April, 1934, term to issue refunding bonds of the county in the sum of \$2,184,100.00. The board reserved the right to call in and pay the bonds in the inverse order of their maturities and provided that written notice of the exercise of the reserved right would be given to the National City Bank in the City of New York where the bonds were payable. The statutory proceeding was properly pursued, and the bonds were validated by a decree of the chancery court on the 4th day of June, 1934.

Thereafter, after some of the bonds had been sold, at the instance of a bond attorney who was a stranger to the proceeding, the board of supervisors entered an amendatory order on the 6th day of August, 1934, attempting to amend its order of May 7, 1934, so as to make the bonds non-callable. Thereafter, the board attempted to refund the above issue and to call the prior issue. To that end, at the November, 1940, term of the board, it took proper steps for the refunding issue. But, when the hearing on the validation came on before the chancellor, appellant as a taxpayer and a holder of some of the 1934 issue objected to the validation of the said bonds on three grounds:

"(1) That by reason of the amendatory order dated August 6, 1934, the bonds of that issue are non-callable;

"(2) That the power to refund bonds under Sec. 4, Chap. 143, Laws 1934, is exercisable only when there are no funds available in the ordinary management of the fiscal affairs of the county, and

"(3) That the court has no jurisdiction over the bondholders of the 1934 issue, and therefore, can make no order affecting their rights of interest."²¹

The court very properly held that a validation decree forecloses every question which could have been raised by any taxpayer against the legality of the issue. Consequently, the amendatory order of August 6, 1934, was of no valid effect, and the bonds of 1934 stand as if that order had never been made.

Appellant's second objection was not maintainable as seeking to place too narrow a construction on the statutes.

As to the third objection the court held that the validation proceeding is purely a question between the board and the taxpayer, and, if the

²⁰190 Miss. 365, 200 So. 245 (1941).

²¹*Love v. Humphrey County*, 190 Miss. 365, 371, 200 So. 245, 247 (1941).

bonds are validated, they then become of unquestionable legality as between the county, the taxpayers and the purchasers of the refunding bonds. And in as much as the holder of the older bonds is not a party to such proceeding, nothing is adjudicated as against them, but, should they hold the said older bonds and seek to collect the interest thereon, they would be met with no more than what confronts litigants generally; that is to say, the obstacle of *stare decisis* but not with any such defenses as *res adjudicata* or the law of the case.

Any other interpretation of the questions involved would have had effect of nulifying the validation proceedings, and it would certainly have affected the negotiability of county bonds.

The case of *Logan, Chancery Clerk v. Mississippi Abstract Co.*²² was a proceeding by mandamus to compel the Chancery Clerk of Coahoma County, Mississippi, to allow the Mississippi Abstract Company to make photographic copies of all of the land records of the County. The case is simply an interpretation of Section 350, Mississippi Code of 1930, as the same relates to a Mississippi corporation whose charter grants to it the right and power to make copies of public records. The court readily held that the denial of the right by counties would nullify the explicit right granted it by the state, and the general effect of the decision was to place a liberal construction on Section 350, Mississippi Code of 1930, so as to allow by all means and devices any reasonable and proper method, under existing conditions, of making copies of public records.

The case of *O'Neal v. Fairley*²³ was a quo warranto proceeding brought by O'Neal against Fairley to have the latter ousted from the office of member of the Board of Supervisors of Harrison County, claiming that he had been elected thereto and seeking to be installed in the office. It developed that Fairley had not qualified for the office because of his inability to make bond in the requisite sum, and at the time of the proceeding Fairley was not acting as a member of the board of supervisors.

The court held under Chapter 59, Mississippi Code of 1930, dealing with quo warranto proceedings, that, in order to maintain such a proceeding as this to try the right to a public office, it must appear that the respondent is in actual possession and use of the office in question.

Consequently, under such a state of facts as was presented here, neither had the right to resort to *quo warranto*. The remedy would be by some other proceeding.

²²190 Miss. 479, 200 So. 716 (1941).

²³190 Miss. 650, 200 So. 722 (1941).

The case of *Ritter v. Yalobusha County*²⁴ was an action on a promissory note executed by the president of the board of supervisors pursuant to an order of the board, but without being authorized by a majority of the electors of the county, either by petition or election. And when it was issued there was no money in the county treasury for its payment when it became due.

The court held that the said note was void under the provisions of Section 5979, Mississippi Code of 1930, and that the invalidity thereof was not cured by Chapter 16, Laws of the Second Extraordinary Session of 1936, by which were validated certain enumerated outstanding indebtednesses of counties, municipalities and other taxing districts contracted in violation of governing statutes.

D. HIGHWAYS

In the case of *Jenkins v. Board of Supervisors, Lee County*,²⁵ the board of supervisors of said county ordered that serial bonds of the Third Supervisor's District of Lee County, which is a separate road district and is specifically recognized as such, be issued for the purpose of paying a \$14,000.00 judgment which was rendered in favor of the state tax collector against the said road district. When proceedings to validate the bonds came on to be heard, appellants objected upon the ground that Section 5977, Mississippi Code of 1930, under which the said bonds were ordered, did not authorize bonds for payment of outstanding obligations unless the obligations were of a municipality or of a county and that said statute did not include obligations which are of a separate road district.

In affirming the judgment of the lower court wherein said bond issue was validated, the Supreme Court pointed out that in the case of *Brown v. Simpson County Supervisors*²⁶ the court held that funding bonds for a supervisors district may be issued under Section 5977, Mississippi Code of 1930, and that in the case of *Edmonson v. Calhoun County Supervisors*²⁷ it was held that Section 5979, Mississippi Code of 1930, applies to road districts, although that section also speaks only of counties and municipalities.

The court further stated that Sections 5977, 5978, and 5979, Mississippi Code of 1930, are associated sections, designed to avoid the evils of the credit system in municipal and county fiscal management. It is equally within the purpose of the statutes and within the evils sought to be avoid-

²⁴2 So. (2d) 152 (Miss. 1941).

²⁵189 Miss. 814, 199 So. 90 (1940).

²⁶185 Miss. 659, 187 So. 738 (1939).

²⁷185 Miss. 645, 187 So. 538 (1939).

ed by them that separate road districts, managed as they are by the county board of supervisors, shall be included in those sections.

E. MUNICIPAL CORPORATIONS

In the case of *Jimmerson v. Oxford*,²⁸ appellant was convicted for having intoxicating liquor in his possession in violation of an ordinance of the City of Oxford. Appellant appealed on the ground that the ordinance was not entered in the ordinance book in compliance with Section 2545, Mississippi Code of 1930. A printed proof of publication setting forth the ordinance and the date of its passage was pasted to one of the pages of the book instead of being entered therein "at length in a plain and distinct handwriting or typewriter."

The court held that to say the statute was not thereby complied with would be hypercritical and would sacrifice substance to shadow; and, further held that the failure of the clerk to append a note stating the date of its passage and to cite therein the book and page of the minutes containing the record of its passage is a breach of a merely directory requirement and had no effect on the validity of the ordinance. The cause was accordingly affirmed.

The case of *Louisville v. Chamber*²⁹ was a suit by the appellees, who are lawyers, against the City of Louisville. The suit was to recover a balance of \$3,167.50 as a fee claimed to be due them for refunding the bonded indebtedness of the city in the approximate sum of \$468,837.77 under proceedings authorized by Chapter 143, Mississippi Laws of 1934. A counter-claim was filed by the city to recover payments theretofore made to the appellees. The city had entered into a contract of employment in writing with the attorneys for a cash payment of \$1,000.00 and a contingent fee of a certain percent of the amount of the bonds refunded bearing as low interest as 5%.

At the time of the contract, there was in the city treasury bond and interest fund account \$10,448.00, out of which fund the \$1,000.00 retainer was paid. Later \$2,750.00, a part of the contingent fee, was paid out of the same fund. There was left a balance due on the contingent fee in the amount sued for and for which judgment was rendered.

The city defended and sought to recover back the payment made upon the ground that the contract of employment violated Section 5979, Mississippi Code of 1930.

The court held that the provisions of Section 5979 have no application to an indebtedness of this character and cited several Mississippi

²⁸190 Miss. 884, 2 So. (2d) 152 (1941).

²⁹190 Miss. 833, 1 So. (2d) 771 (1941).

cases. The court also held that Section 4, Chapter 143, Mississippi Laws of 1934, under the facts of this case, would make it mandatory on the municipal authorities to refund the bonds and that the municipality, of course, would be authorized to incur the necessary expenses to do so, including reasonable attorney's fee. Further, the Chancellor having held that such sum was reasonable, his findings would not be disturbed.

The facts of the case of *Smith v. Mitchell*³⁰ were as follows: The City of Louisville entered into a certain contract with one Leland Smith in November, 1938. The terms of the contract authorized the said Leland Smith to represent the city in collecting any money due and owing the city by any person, firm or corporation on account of any claim or cause of action of any nature whatsoever except taxes and claims against past city officials. Leland Smith, the appellant, was to receive one half of any sums collected and was further authorized in his discretion to sue, settle, or compromise any such claims. In consequence thereof, the said Leland Smith, suing on his own behalf and on behalf of the city, sought to recover \$25,000.00 against appellees for the purchase price of the city ice plant, building, machinery and equipment under the terms of a purported sale in the year 1926.

There was attached to the bill of complaint as an exhibit an order of the new mayor and board of aldermen, dated January 7, 1939, terminating the contract of employment with Smith. The suit was instituted on August 12, 1939, and the cause was heard on separate demurrers filed by the appellees.

The court very properly held that the mayor and board of aldermen were without authority to delegate for an unspecified time the right or power to any individual to settle or compromise any claim or cause of action existing in favor of the city. Further, one administration could not bind a subsequent administration by such attempted delegation of authority as to suits that might be instituted during the ensuing term, without its consent and contrary to an expressed objection and order duly entered of record prior to the filing of such suit. The court cited as authority the cases of *Edwards Hotel & City St. Ry. v. City of Jackson*³¹ and *Tullos v. Town of Magee*.³²

*Aberdeen v. Bank of Amory*³³ is a case wherein Crosby and Sherman assigned as collateral security to the Bank of Amory for a loan a certain amount to become due and owing to them from the City of Aberdeen.

³⁰190 Miss. 819, 1 So. (2d) 765 (1941).

³¹96 Miss. 547, 51 So. 802 (1910).

³²181 Miss. 288, 179 So. 557 (1938).

³³2 So. (2d) 153 (Miss. 1941).

The clerk of the city endorsed on the assignment in due course the following: "City of Aberdeen, Mississippi, filed in this office, this the 25th day of May, 1936. R. C. Maynard, City Clerk." In October, 1936, Crosby and Sherman notified the city that they had paid their indebtedness to the bank. That statement was untrue.

Relying upon that statement, however, the city clerk returned the assignment to the bank without explanation, except he wrote across the filing entry in blue pencil the word "void." The notation was so indistinct as to be hardly noticeable.

The officers and employees of the bank testified that they did not know that the notation was on the assignment when received nor afterwards until the city had paid Crosby and Sherman \$198.30, the amount for which judgment was rendered.

The court held that part of the duties of the clerk is to keep the governing officials of the municipality informed as to records and papers and that the filing of the assignment with the city clerk was notice to the governing authorities of the municipality. Also it was held the statement made by Crosby and Sherman to the city clerk that the debt to the bank had been paid did not revoke the assignment.

The gravamen of the case of *Brewer v. Lucedale*,³⁴ although involving a city's liability for personal injury caused by the negligence of the city in maintaining an uncovered concrete catch basin which extended into the city street, the case is common law negligence, and really determines no issue involving public interest.

F. STATUTES AND STATUTORY CONSTRUCTIONS

In the case of *Craig, State Tax Collector v. Brown and Williamson Tobacco Corp.*³⁵ the State Tax Collector instituted suit to recover from Brown and Williamson Tobacco Corporation a privilege tax imposed by Section 221, Chapter 120, Mississippi Laws of 1940, which section reads as follows:

"Upon each person doing business as a transit vendor or dealer as defined in this section and upon which a privilege tax is not specifically imposed by another section of this act, a state-wide tax for each county according to the following schedules . . . upon each transit vendor or dealer of cigarettes, cigars or other tobaccos, \$50.00."

Section 1, Chapter 120, Mississippi Laws of 1940, provides that:

"The term person shall include any individual, firm, partnership, joint adventure, association, corporation, estate, trust or

³⁴189 Miss. 374, 198 So. 42 (1940).

³⁵190 Miss. 360, 200 So. 446 (1941).

any other group or combination acting as a unit unless the intention to give a more limited meaning is disclosed by the context."

In affirming the lower court's decision that the Brown and Williamson Tobacco Corporation was not liable for the privilege tax, the Supreme Court pointed out that Section 221, Chapter 120, Mississippi Laws of 1940, appeared as Section 225, Chapter 154, Mississippi Laws of 1936, which section was construed in *Gully v. Joseph*,³⁶ wherein the court held that it applied only to the individual actually peddling the goods and not to the person by whom he was employed so to do.

In the instant case, the court held:

"This appellee here, being a corporation, of course cannot itself actually peddle goods, so that it is not liable for the tax here imposed unless there is such a difference between Section 221, Chapter 120, Laws of 1940 and Section 225, Chapter 154, Laws of 1936, as to lift the former without the orbit of the case just cited."³⁷

The state tax collector contended that such a difference existed, because the 1936 statute imposed the privilege tax upon each natural person doing business as a transit vendor or dealer as defined in this section, while the 1940 statute imposed the tax upon each person doing business as a transit vendor or dealer as defined in this section.

However, the court held that the elimination of the word "natural" before the word "person" in the second statute was of no consequence here, for the eight definitions of a transit vendor in both of the sections are the same and restrict the term to persons who themselves actually peddle, sell and deliver goods, wares and merchandise.

G. SCHOOLS AND SCHOOL DISTRICTS

*National Surety Corp. v. State*³⁸ involves the liability of the county superintendent of education on his official bond for the issuance of pay certificates in excess of funds to be received under the budget estimate for the current fiscal year as provided by Section 14, Chapter 255, Mississippi Laws of 1936.

The court held that in order to recover the penalty the burden is on the holder of the certificate to establish by competent evidence that the issuance of the particular certificate was at that time in violation of Section 14, Chapter 255, Mississippi Laws of 1936 and that the certificate was

³⁶183 Miss. 662, 184 So. 818 (1938).

³⁷Craig, *State Tax Collector v. Brown and Williamson Tobacco Corp.*, 190 Miss. 360, 364, 200 So. 446, 447 (1941).

³⁸189 Miss. 540, 198 So. 299 (1940).

then in excess of the funds received for the fiscal year and not funds on hand at the date of its issuance.

The case of *Hisaw v. Ellison Ridge Consolidated School District*³⁹ held that a petition and order thereon for an issuance of bonds by a school district to erect, repair, and equip school buildings, teachers' homes, etc., was fatally defective for the reason that "etc.," being an abbreviation of *et cetera*, meant for other purposes of like kind and character and was, therefore, broader than the statute. The said petition, then, prayed for things which the said statute did not embrace and, therefore, fell within the principles announced in *Board of Supervisors v. Clark*.⁴⁰

*Gordon v. Trustees Tuscumbia School District*⁴¹ is a case holding that certificates issued to a pupil carrier whose contracts are not in writing are invalid under Section 6639, Mississippi Code of 1930, requiring carrier contracts to be in writing. The court cited as authority the case of *American Book Company v. Vandiver*.⁴² Further, the court said the invalidity of the contract was not cured by the curative act of Chapter 255, Mississippi Laws of 1936.

H. EMINENT DOMAIN

In the case of *Mississippi State Highway Department v. Hillman*⁴³ the Supreme Court considered several important points of Public Law, although a large part of the court's decision was taken up with a discussion of whether certain evidence should have been admitted at the trial of the cause.

The first important point decided by the Supreme Court was that the burden of proof as to damages in a condemnation proceeding is upon the highway commission. Mississippi has no statute which in express terms fixes the burden of proof in eminent domain proceedings, and, consequently, this has been a controversial point for a number of years. Apparently the matter is now decided once and for all.

The court further promulgated a formula for the measuring of damages when part of a larger tract of land is taken. That formula is:

"When part of a larger tract of land is taken for public use, the owner should be awarded the difference between the fair market value of the whole tract immediately before the taking and the fair market value of that remaining immediately after the

³⁹189 Miss. 664, 198 So. 557 (1940).

⁴⁰163 Miss. 120, 140 So. 733 (1932).

⁴¹1 So. (2d) 234 (Miss. 1941).

⁴²181 Miss. 518, 178 So. 598 (1938).

⁴³189 Miss. 950, 198 So. 565 (1940).

taking without considering general benefits or injuries resulting from the use to which the land taken is to be put that are shared by the general public."⁴⁴

However, the court held that there are exceptional cases to which the above stated formula is not applicable, it being a question of fact of whether the rule is applicable in a particular case. The court again reiterated its definition of market value of property, which is as follows:

"The market value of property is the price which it will bring when it is offered for sale by one who desires but is not obliged to sell it and is bought by one who is under no necessity of having it."⁴⁵

In the case of *Dantzler v. Mississippi State Highway Comm.*⁴⁶ the State Highway Commission was condemning certain property belonging to the appellant, and at the trial of the cause in the county court the jury rendered a verdict of one dollar in damages. The judgment was affirmed in the circuit court and the owner appealed to the Supreme Court. He assigned as one of his principal reasons for reversal that the State Highway Commission's offer of one dollar for a deed was not equivalent to an offer as provided in Section 4998, Mississippi Code of 1930, which requires as a condition precedent to a condemnation of land by the highway commission that an attempt shall first be made to agree with the owner.

In disposing of this contention, the Supreme Court said:

"That while an effort to agree with the owner must be in good faith and on reasonable terms, the attempt need not be pursued further than to develop the fact that an agreement is impossible at any price which the condemning party is willing to pay and particularly so when, as in the instant case, the price which the condemnor offered is supported as fair and just by competent witnesses in the trial and not connected either with the condemnor or the owner."⁴⁷

However, the Supreme Court reversed the decision of the lower court because of the admission in evidence of testimony that 106 out of 108 owners of similar property had granted a right-of-way to the highway commission for this particular project for the consideration of one dollar each. Proper objection was seasonably made to the introduction of such evidence, and, in reversing the case, the court stated that the better rule and the one supported by the weight of authorities is:

⁴⁴*Mississippi State Highway Department v. Hillman*, 189 Miss. 850, 866, 198 So. 565, 569 (1940).

⁴⁵*Id.* at 869, 198 So. at 571.

⁴⁶190 Miss. 137, 199 So. 367 (1941).

⁴⁷*Dantzler v. Mississippi State Highway Comm.*, 190 Miss. 137, 151, 199 So. 367, 369 (1941).

"That the price paid in settlement of condemnation proceedings or the sum paid by the condemnor for similar land even if proceedings had not been begun is inadmissible—such payments being in the nature of compromise and not a fair indication of market value."⁴⁸

The case of *Rand v. Mississippi State Highway Comm.*⁴⁹ was similar in all respects to the *Dantzler* case aforesaid and was reversed and remanded because of the admission of the evidence as commented on in the *Dantzler* case.

However, the court had before it an assignment of error not present in the *Dantzler* case, which was that the commission was not authorized to condemn land for highway construction and improvement which was to be used as parking bays, bus stops and sodded areas between one-way traffic lanes. In passing on this point, the court stated that the above enumerated items have become approved features in modern highway construction and are manifestly an incident to greater safety and convenience in highway service. Consequently, the highway commission was authorized to condemn such property for highway purposes.

VIII.

TAXATION

*Marvin Williams**

A. CONSTITUTIONALITY

In the case of *Standard Oil Co. v. Stone*¹ the court was confronted with the question of the constitutionality of a provision of the sales tax law which makes the property of the lessor liable for a two percent retail sales tax due by its lessees. The state had been unsuccessful in many of its attempts to collect taxes from irresponsible men to whom the major oil companies had leased their service stations. These lessees frequently had no property and the state lost the taxes. The legislature passed the instant statute in an attempt to insure the proper administration of government by making the property of the lessor liable for the taxes where the lessee is unable to pay them. The Standard Oil Company paid the taxes on behalf of four of its lessees and brought this action against the chairman of the state tax commission to recover them. While the statute does not specifically refer to purveyors of petroleum products, the appellee con-

⁴⁸*Id.* at 151, 199 So. at 371.

⁴⁹199 So. 374 (Miss. 1941).

*Member Mississippi and Holmes County Bars; Lexington, Mississippi.

¹2 So. (2d) 165 (Miss. 1941).

ceded that it was directed primarily at them; whereupon, the appellant contends that the provision is discriminatory and thus unconstitutional.

The court cites the rule of construction laid down in the earlier case of *Russell Investment Corp. v. Russell*² that:

"One who assails the classification in a statute must carry the burden of showing that it does not rest on any reasonable basis. . . . In determining whether statutes enacted by the legislature transcend the limits imposed by the Federal and state constitutions the courts should proceed with the greatest possible caution; and they should never declare a statute void unless its invalidity is in their judgment established beyond reasonable doubt."

In approving the classification and upholding its constitutionality the court relies chiefly upon *Hodge v. Muscatine County*.³ In that case the United States Supreme Court upheld an Iowa statute, making the tax imposed thereby on the business of selling cigarettes a lien upon the property where the business is carried on, on the ground that due process of law is not denied if the owner of the property has an opportunity to be heard as to the validity of the tax at any time before it is made final.

In giving an opportunity to be heard, the Mississippi statute⁴ provides that if no return is made by a taxpayer, he shall be notified to make it within ten days. If he fails to do this the commissioner may make it from the best information available. If the taxpayer objects to this return he may petition for a hearing on it. Then, if he is required to pay the tax wrongfully, he may institute suit in the circuit court to recover the amount, and, if he is unsuccessful there, he has a right of appeal to the state Supreme Court.

In order further to strengthen its decision the court emphasized the fact that the lessor selected the location, designed the building and fixtures, and limited their use to the sale of its products. Thus the lessor was, to that great extent, interested in the filling station and in the volume of business done by it. In the *Hodge* case the owner's interest was limited to a desire to see the business succeed only to such an extent that he would be able to collect his rent.

In *Aponaug Mfg. Co. v. State Tax Comm.*⁵ the appellant attacked the constitutionality of the state's imposition upon it of a privilege tax computed upon the basis of gross sales under Section 2, Chapter 119,

²182 Miss. 385, 178 So. 815 (1938), *sugg. err. overr.*, 182 Miss. 385, 418, 182 So. 102, 107 (1938). For a full discussion of this case see Note (1941) 13 MISSISSIPPI LAW JOURNAL 535.

³196 U. S. 276, 25 Sup. Ct. 237, 49 L.ed. 477 (1905).

⁴Miss. Laws (1938) c. 113, §§6-8.

⁵190 Miss. 805, 1 So. (2d) 763 (1941).

Mississippi Laws of 1934. Appellant sells its manufactured goods chiefly in other states and some of those states subject it to a sales tax. It contends here that this exposes it to cumulative or multiple burdens of taxation and that the Mississippi law is thus invalid as an undue burden on interstate commerce.

The court upholds the constitutionality of the tax by explaining that the Mississippi act taxes the activity carried on in this state under the protection of Mississippi laws, or taxes the *privilege* of engaging in manufacturing in this state. Thus it is a privilege tax regardless of the name given it and regardless of the fact that it is computed on the basis of gross sales. The gross sales merely affords a measure of the amount of manufacturing done and thus is a fair basis for computing a tax on that activity. The fact that it is computed on the basis of gross sales does not make it a tax on the sale. The court distinguishes between the privilege tax, or the tax upon the "activity" of manufacturing imposed by Mississippi, and the "sales taxes" imposed by the other states. Thus the taxes laid on the company by Mississippi and the other states are not upon the same activity and are not "multiple burdens" in the unconstitutional sense of that term.

B. GENERAL PROPERTY TAX

(1) Exemptions

The only case involving exemption from ad valorem taxes coming before the court was *Board of Supervisors of Lee County v. Mid-South Mfg. Co.*⁶ The Mid-South Manufacturing Company was organized under the general incorporation laws of the state on December 10, 1938. The "Balance Agriculture With Industry" Act⁷ passed in 1936 was in effect at the time, but the appellee corporation was not organized under its provisions. That act exempts new factories and new enterprises of public utility, "established under the provisions of this act or otherwise hereafter established as hereinafter enumerated," from all ad valorem taxes. Section 3109, Mississippi Code of 1930, as amended,⁸ provides for exemption from taxes for new enterprises, but it does not exempt them from state ad valorem taxes. The Mid-South Company applied for exemption from all ad valorem taxes under the Balance Agriculture with Industry Act, and the lower court approved the action of the board of supervisors in granting it. This appeal is from that lower court decision. The question presented is whether appellee is entitled to the exemption from all ad valorem taxes under the act or only from local ad valorem taxes under the code section and its amendments.

⁶190 Miss. 812, 1 So. (2d) 802 (1941).

⁷Miss. Laws Ex. Sess. 1936, c. 1.

⁸Section 3109 was amended by Miss. Laws (1932) c. 293; Miss. Laws (1936) c. 159; Miss. Laws Ex. Sess. 1938, c. 76.

The Supreme Court, in affirming the action of the lower court, pointed out that the code section, with its amendments, clearly was intended to reflect the permanent policy of the state, while the Balance Agriculture with Industry Act was intended to express only a temporary policy and was by its own terms adopted to provide relief from an economic emergency. The court says:

"Construing them together, we are of opinion that the legislature intended by the latter statute while in force that the exemption therein provided should extend to corporations chartered and organized during that period under any other statutes as well as those organized under that statute, and that when the B. A. W. I. statute expired by limitation the Code section and amendments should control in the future. In other words, the legislature intended that there should be no discrimination in favor of the B. A. W. I. corporations against others organized while that statute was in force."⁹

This holding is strengthened by the committee amendment cited in the opinion as follows: "Committee Amendment No. 33: Amend Section 19 by inserting after the word 'act' in line two thereof the words 'or otherwise hereafter established as hereinafter enumerated.'"¹⁰

While this question was not discussed in *Meador v. Mac-Smith Garment Co.*,¹¹ the majority opinion says that it was necessarily involved, for if this construction is not correct, the case would have been decided the opposite way.

Mr. Justice Roberds and Chief Justice Smith dissent on the ground that Chapter 76, Laws of the Extraordinary Session of 1938, an amendment of the code section, expressly states that such enterprises are not exempt from state ad valorem taxes. It is their position that the 1938 statute conflicts with and thus supersedes the Balance Agriculture with Industry Statute and that the Mid-South Company is governed by its provisions, since it was organized under the general incorporation statutes of the state after the 1938 law became effective. They distinguish the *Meador* case on the ground that the factory in question there was organized after the enactment of the Balance Agriculture with Industry Statute but before the passage of the 1938 law. The dissenting opinion repeats the familiar rule that exemptions will never be presumed but must be clearly established by the claimant.¹²

⁹Board of Supervisors of Lee County v. Mid-South Mfg. Co., 190 Miss. 812, 817, 1 So. (2d) 802, 803 (1941).

¹⁰House Journal of the First Extraordinary Session of 1936, p. 810.

¹¹188 Miss. 98, 191 So. 129 (1939).

¹²Jackson Fertilizer Co. v. Stone, 173 Miss. 183, 162 So. 170 (1935); Gulfport Bldg. & Loan Ass'n. v. Gulfport, 155 Miss. 498, 124 So. 658 (1929); Barnes v.

(2) Tax Sales

In the case of *Johnson v. Langston*¹³ the court was presented with the question of the type of deed necessary to convey title under a tax sale. The lands were sold at a duly held tax sale, and the sheriff then filed his list of lands sold to individuals for delinquent taxes in the office of the chancery clerk as provided by law, showing the sale of the land here in question to appellant's assignor, the State Bank of Corinth. The bank never applied for and never received a tax deed. It sold the land to appellant, Johnson, who sues to cancel the claim of the original owner of the land. Johnson contends that the filing of the said list by the tax collector vested the title to this land in the bank, subject only to the right of redemption for two years, and that no actual tax deed was necessary.

The court cites *Hatchett v. Thompson*,¹⁴ which holds that the seal of the chancery clerk is essential to the validity of the tax deed in a suit to cancel claims in favor of the tax purchaser. They reasoned from this case that if there was no deed at all appellant has no rights which are enforceable in a proceeding to cancel.

In *City of Jackson v. Ashley*¹⁵ the land was sold under a valid assessment and a valid tax sale. The question presented was whether this tax sale extinguished limitations on the use of the land set in a prior deed and gave the purchaser a perfect title, or whether the land was still subject to a restrictive covenant in the prior conveyance, which fixed a minimum value for buildings placed upon it. Section 3273, Mississippi Code of 1930, provides, "Such conveyance shall vest in the purchaser a perfect title. . . ." The court says that if that limitation controls, then the tax deed would not give a perfect title. If such a restrictive covenant is a property right reserved by the remote grantor and cannot be deprived without due process of law, then this statute is invalid. But this assessment was upon the property as a whole, and it devolved upon everyone in any way interested in the land to see that the taxes were paid. Where the entire property is so assessed under a valid assessment, a valid sale operates to convey all the title and all of the property therein and to cut off any limitations upon the title.

The right of redemption from a tax sale is considered in *Hanna v. Ford*.¹⁶ Section 3264, Mississippi Code of 1930, provides for a two year

Jones, 139 Miss. 675, 103 So. 773, 43 A. L. R. (1925); *Millsaps College v. City of Jackson*, 136 Miss. 795, 101 So. 574 (1924), *aff'd*, 275 U. S. 129, 48 Sup. Ct. 94, 72 L.ed. 196 (1927); *Morris Ice Co. v. Adams*, 75 Miss. 410, 22 So. 944 (1898).

¹³189 Miss. 649, 198 So. 321 (1940).

¹⁴174 Miss. 502, 165 So. 110 (1936).

¹⁵189 Miss. 818, 199 So. 91 (1940).

¹⁶189 Miss. 464, 198 So. 37 (1940).

period after the tax sale during which the owner may redeem the land, with a saving clause in favor of minors until two years after attaining majority. This section was amended by Chapter 286, Mississippi Laws of 1932, to provide: "Saving only to infants who have or may hereafter inherit or acquire by will . . . the right to redeem the same within two years after attaining full age. . . ."

In the instant case the owner acquired the land by deed in 1931 while he was a minor. The land was sold for delinquent taxes in 1934. The minor became of age in 1938 and attempted to redeem. He contends that the amendment of 1932 does not apply to him as he already had the land when it became effective and that the amendment provides a saving to those "who *have* or may hereafter inherit. . . ." The court denied his right to redeem on the ground that the saving provided in Chapter 286, Mississippi Laws of 1932, is for the benefit only of those infants who inherited or acquired the land by will and that the word "have", although in the past tense, refers to the word "inherit".

In the earlier case of *Moore v. Rotenberry*¹⁷ the court construed the purpose of this statute as being to prevent a conveyance to a minor for the sole purpose of preserving the right of redemption for several years. To hold that this statute provides a saving to those minors who had already acquired land by deed prior to its enactment would be to impute to the legislature the intention of condoning past evils of this nature which were calculated to impede the administration of government. The question involved here is solely one of statutory construction, where the court placed its chief emphasis upon the intention of the legislature and adopted a construction of the somewhat questionable grammar used which would give effect to that intention.

C. PRIVILEGE TAXES

In *Drennan v. Stone*¹⁸ the appellant paid a privilege tax on the operation of a portable sawmill with which he sawed timber into large dimensions suitable for sale to mills which would re-saw it into lumber. The State Tax Commission collected one-fourth of one percent of the value of the products of the mill under Section 2-b, Chapter 119, Mississippi Laws of 1934. Appellant paid the taxes under protest and sued to have it refunded on the ground that he should have been taxed under Section 2-a of the act instead of Section 2-b.

The court did not decide whether appellant was liable under Section 2-a as it contended but only considered whether it was liable for the tax

¹⁷188 Miss. 882, 196 So. 758 (1940).

¹⁸190 Miss. 874, 1 So. (2d) 799 (1941).

which it paid and hereby seeks to recover. Section 2-b imposes a tax as follows: "Upon every person engaging or continuing within this state in the business of manufacturing, compounding, or preparing for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities. . . ."

The court says that there is no doubt that appellant was engaged in preparing the material so that it would be suitable for use by, and sale to, re-saw operators. In this activity he received the protection of the laws of the state for which protection this privilege tax was levied. Thus he was liable for the tax.

Section 2-h, Chapter 119, Mississippi Laws of 1934, provides: "In computing the amount of tax levied under this act, there shall be excepted from the gross income of the business, or gross proceeds of sales, as the case may be, so much thereof as is derived from sales to the United States government. . . ." In *Stone v. Green Lumber Co.*¹⁹ the lumber company sought exemption from the privilege tax computed on the proceeds of sales to the United States of lumber manufactured to specifications for portable or prefabricated houses. The court refused to approve the exemption, construing the section quoted as applying to taxes on the sales and not to this privilege tax, which is merely computed on the basis of sales. Neither the ultimate disposition of the manufactured products nor the existence of exemptions affecting liability for tax upon the sales thereof affects the liability for the privilege tax as a manufacturer.²⁰

The court emphasizes the point that this tax is on the *activity* of manufacturing and is not a tax upon the sales, although the gross income is used as a basis upon which to compute it.

The distinction between this privilege tax and the so-called "sales tax" was explained in the case of *Aponaug Mfg. Co. v. State Tax Comm.*,²¹ discussed previously herein. The privilege tax is not a sales tax, although the amount of it is computed on the basis of gross sales. The privilege tax is a tax upon the activity of manufacturing, and the gross sales is only a just way to measure the extent of the activity and the consequent amount of the tax.

¹⁹1 So. (2d) 764 (Miss. 1941).

²⁰*Aponaug Mfg. Co. v. State Tax Comm.*, 1 So. (2d) 763 (Miss. 1941); *Compress of Union v. Stone*, 188 Miss. 49, 193 So. 329 (1940); *Southern Package Corp. v. State Tax Comm.*, 174 Miss. 212, 164 So. 45 (1935); *Jackson Fertilizer Co. v. Stone*, 173 Miss. 183, 162 So. 170 (1935).

²¹190 Miss. 805, 1 So. (2d) 763 (1941).

IX.

TORTS

*Maxwell Bramlette**

A. MASTER AND SERVANT

In the case of *Crosby v. Burge*¹ plaintiff below sued defendant for damages growing out of an injury resulting from the alleged negligence of defendant in supplying an unsafe horse. Plaintiff charged that the furnishing of the unsafe horse was the proximate cause of his injury.

The court held that the master is under no duty to furnish a safe horse but only a reasonably safe horse for the work involved. Testimony was to the effect that the horse would jump or side-step when struck by a bush or some other object. In taking judicial notice of the character and habits of domestic animals, the court pointed out that it is common knowledge that any horse, regardless of how gentle he may be, is likely to jump or lunge forward when his companion animal falls or hits against him from a three or four foot embankment. Such proof does not warrant that degree of proof necessary to show that the horse is wild or unfit for use. Appellee was plowing in cut-over land among tung oil trees, and the court held that he was familiar with the work in which he was engaged and that while it was the duty of the appellants to furnish reasonably safe instruments for doing the work, considering all the surrounding circumstances, yet the appellee assumed the usual, ordinary, inherent and natural risks incident to the work he was doing.

This case contains a definition of proximate cause. The court gives as such definition that proximate cause is the active and efficient cause that sets in motion a train of events which bring about a result without the intervention of any force started and working actively from a new and independent source. The court pointed out in this connection that appellee had complete control and charge of the manner of doing the work. He placed the animal in a position from which the train of events began. The judgment of the lower court was reversed and judgment was rendered for the appellants.

In *Granquist v. Crystal Springs Lbr. Co.*² one Huntington, employee of appellee, injured appellant in an automobile collision.

Appellant here sued Huntington in the Federal District Court and received a judgment from which no appeal was taken by either party. The

* Member American Bar Association and Mississippi and Wilkinson County Bars; Woodville, Mississippi.

¹190 Miss. 739, 1 So. (2d) 504 (1941).

²190 Miss. 572, 1 So. (2d) 216 (1941).

suit here is by the same injured party against Huntington's employer, and liability is based solely on the doctrine of *respondeat superior*.

To plaintiff's declaration in the lower court defendant filed a plea in bar setting up the suit in the federal court and the fact that the liability of appellee here was grounded solely upon the theory of *respondeat superior* and that all facts and circumstances in the suit in federal court were precisely the same as in the suit at bar. To this plea in bar plaintiff filed a demurrer which was overruled. Whereupon, the plaintiff declined to plead further and hence this appeal.

The sole question in this case is whether the recovery of a valid, collectible judgment against a servant, with full knowledge of all the facts, is a bar to a subsequent action against the master whose liability arises solely and only by virtue of the doctrine of *respondeat superior*, and without fault on his own part, the latter action being for the identical act of negligence.

The court, in affirming the ruling of the lower court which overruled the demurrer to the plea in bar, distinguished the difference between joint tort-feasors and liability of the master growing out of a tort in which the servant is the sole actor and where solely the doctrine of *respondeat superior* is involved and pointed out that the liability in the latter instance is joint and several, but that the master and servant are not joint tort-feasors. The court further held that when a third person, with full knowledge of all facts and circumstances, has by suit or action had a recovery against the agent or employee for the wrong committed by such agent or employee as the sole actor; liability of the principal or master, being solely derivative of the tort of the agent or servant, becomes merged in the recovery against the agent or servant, if that judgment be collectible, for the reason that the wrong has been legally satisfied and no subsequent or separate action against the principal or master will be allowed.

In building one of the piers located in midstream of the Mississippi River at Natchez, appellant provided transportation by boat to and from said pier for its employees. Appellee was deposited on the Mississippi side at about 11:30 P. M. by defendant's boat, and in making his way along the river's bank to the City of Natchez, appellee fell into a large hole or washout and was severely injured. Appellee recovered judgment in the lower court.³

In reversing the judgment of the lower court and entering judgment for appellant, the court held that a master is not liable for allowing or requiring a servant to be transported to premises of a third person, even

³*Dravo Corp. v. Copeland*, 190 Miss. 269, 199 So. 769 (1941).

though potentially dangerous, in the absence of actual knowledge by the master of an inherent condition which requires the exposure by the servant to a danger so imminent and so reasonably unavoidable that resultant injury is foreseeable as a reasonable probability.

In sustaining this legal proposition the court pointed to the fact that the record disclosed no proof of defendant's knowledge of the condition of the terrain over which plaintiff was to pass after debarkation, nor that there was only one passable route and that such route was so fraught with danger as to charge the defendant with a duty to foresee injury as a reasonable expectancy.

In *Supreme Instruments Corp. v. Lehr*⁴ appellee sued appellant in the court below for damages growing out of an injury allegedly sustained when appellee fell from steps in appellant's building. The steps in question led from a dimly lighted corridor to the ladies' rest room in appellant's manufacturing plant. There were only two steps from the corridor to the level of the rest room and with no electric light in the corridor but with a sky light therein and light entering from the adjoining rooms of the building.

The basis for the case is that appellant was negligent in not providing properly constructed steps, a handrail, and proper lighting.

The refusal of the court below to direct the jury to find a verdict for the appellant and its refusal to grant appellant three separate instructions directing the jury not to consider any of the acts of negligence alleged in appellee's declaration are complained of by appellant on appeal.

However, in affirming the judgment of the lower court the controlling opinion holds that the evidence submitted is such as to be properly considered by a jury. The element of proper or improper lighting, that of proper or improper construction of the steps, lack of handrail and other circumstances were such as to warrant the trial judge in refusing to direct the jury to return a verdict for the appellant and also in refusing to grant appellant the three instructions sought.

In this case there are two strong dissenting opinions which hold, for the most part, that appellant had exercised reasonable care in providing a reasonably safe place and that the difference between the steps provided by appellant and those considered to be standard step height and tread width is too small to permit the entrance of negligence on the part of appellant and consequent liability therefor.

⁴190 Miss. 600, 199 So. 294 (1940).

The case was heard by the court *in banc* on suggestion of error at which time there were three members of the court present, who, because of absence and change in personnel, had not participated in the former decision, which former decision affirmed the judgment of the lower court in awarding damages to plaintiff, but in which former opinion there was a strong dissenting opinion. The opinion sustained the suggestion of error and held that the master was not liable in this case and entered judgment for the appellant.⁵

In *Harvey v. Smith*⁶ plaintiff below, Smith, was employed by appellant to prevent dirt from accumulating on the tracks of the Illinois Central Railroad at a temporary crossing constructed by appellant for hauling dirt across the track. On the day in question, one of appellant's trucks approached the temporary crossing at a rapid rate of speed and proceeded to cross the track just ahead of an on rushing train. The near meeting of the train and the truck prevented appellee from having an easy exit to safety. Consequently, appellee was struck by the train and seriously injured. Whereupon, he instituted suit against the railroad company as well as against appellant. At the trial a peremptory instruction in favor of the railroad company was granted, but a verdict as against appellant was had after a request for a peremptory instruction in his behalf was denied.

In reversing the judgment of the lower court the court invoked the doctrine that an employer is not an insurer of the safety of an employee and that he is not required to guard against possibilities. Applying this principle of the law to the case at bar, the court pointed out that it was beyond the realm of a prudent and reasonable man to expect the employer, appellant here, reasonably to foresee or anticipate such a near meeting of a reckless truck driver and an on-rushing train. The court pointed out that the reasonable anticipation would be that every truck driver would stop the truck before reaching the crossing when a train is approaching.

The only actionable negligence in this case was that of the truck driver, a fellow servant of the plaintiff, and, therefore, liability as against appellant was denied.

In *Kennedy v. Little*⁷ appellee obtained judgment in the lower court against appellant for damages received when he was negligently ordered into a boiler by appellant's foreman for purpose of cleaning same. The only assignments of error were the refusal of the request for a directed verdict and also the refusal to set aside the verdict because it was against the weight of the evidence, appellant's contention being that appellee's testimony was not worthy of belief.

⁵Supreme Instruments Corp. v. Lehr, 1 So. (2d) 242 (Miss. 1941).

⁶190 Miss. 130, 198 So. 739 (1940).

⁷2 So. (2d) 163 (Miss. 1941).

As to the order issued by the foreman, only the foreman and appellee were present, the foreman denying issuing the order and appellee asserting that the same was issued by the foreman. In affirming the judgment of the lower court, the court held that the credibility of witnesses in a case tried to a jury is for its determination. In this case, however, there is a strong dissenting opinion by three of the Justices, pointing to highly contradictory testimony as offered by plaintiff himself and holding that the conflict in his testimony went directly to the question as to whether or not the foreman had ordered him to go into the chamber and was not immaterial matter as the controlling opinion indicated.

In the case of *Morgan v. Loyacomo*⁸ appellee purchased an article of ladies' clothing in one of appellant's retail stores and, having paid for same, departed. White, manager of the store, suspected, but without substantial grounds therefor, that appellee had removed two garments from the store, paying for only one. White followed appellee and, in the presence of several persons outside of the store, stated that he was obliged to investigate and forceably seized the package from under her arm. He opened it, examined and exhibited the contents in the presence of other parties, and found that he was in error. No investigation was made by White prior to leaving the store.

Appellee sued for damages sustained by virtue of White's conduct and received a judgment in the lower court.

The contention of appellant was that the actions of White did not constitute assault and battery and that they were not within the rule which would hold his employers responsible for his actions.

The judgment of the lower court was affirmed, and the court held that the acts done by the manager were so closely embraced or connected with his evident managerial duties, that the said acts may be justly said to have been a part of the *res gestae*. The court further held that White's actions would by all means constitute assault and battery, that such conduct as exhibited by White could not be tolerated, and that the amount of the damages allowed was not excessive.

While employed as general superintendent on a road beautification contract, Taylor was furnished a used pick-up truck by Price. Because of severe personal injuries sustained while returning from business pertaining to his employment, Taylor recovered judgment on the theory of the failure of his employer to furnish a reasonably safe vehicle for his use.⁹

⁸190 Miss. 656, 1 So. (2d) 510 (1941).

⁹Price v. Taylor, 1 So. (2d) 784 (1941).

The opinion disclosed detailed arrangements of employment which showed that Taylor was the general superintendent in charge with full power to have repairs made on the truck. He might have charged the same to Price, trading as Okeechobee Construction Company. Further, Price was absent from the scene of the work.

In reversing the judgment of the lower court and rendering the same for appellant, the court pointed out that the position taken by appellee, that the non-delegable duty of the master to exercise reasonable care to furnish the servant a reasonably safe appliance cannot be abrogated by entrusting the servant with the duty of inspection and repair except as to simple tools, was one well taken as to a servant vested with authority to have repairs made at the expense of the master and who is not competent to make the repairs himself and who has not been employed for the purpose of keeping the appliances in repair. The court further pointed out that the master cannot delegate to a fellow servant the duty of keeping the appliances in a reasonably safe condition for use by other employees.

In the instant case, however, the court held that a different rule applied, namely, that the master is not liable when the servant making the complaint is the general superintendent of the work in the absence of the employer and is representing him, with full authority to have the necessary repairs made so as to render the appliance reasonably safe for his use. The rule applies whether such authority to have the repairs made is established by a general course of conduct or by dealings acquiesced in by the master, as was the case at bar, or has been expressly granted under the terms of the employment. Invoking this rule here, the court held that appellee was such a superintendent, having exclusive use and control of the truck, and was in a better position to learn of the defects rendering it not reasonably safe for use than the defendant who lived in another state. Further, the court held that the plaintiff had full authority, arising out of the dealings between the parties, to have the necessary repairs made when needed.

In *Brewer v. Lucedale*¹⁰ appellant, Brewer, sued the Town of Lucedale for personal injuries sustained by him while working on the streets of the town at or near the intersection of two streets. At this intersection there was a concrete catch basin which extended out into the street and which was open. Approximately 18 inches deep, two feet in length, two feet in width, it extended into the gravelled portion of the street. At the time in question Brewer, in attempting to avoid one of two automobiles which had collided, was driven into this catch basin by one of the vehicles, where he fell and, in doing so, broke his leg.

¹⁰189 Miss. 374, 198 So. 42 (1940).

The defendant contended that the collision of the cars together with the fact that one automobile struck or came into contact with Brewer was the sole, individual, proximate, intervening cause of the injury. The question of the municipality's negligence in constructing an open catch basin protruding into the street was not in dispute. Brewer contended that the negligent act of constructing such basin and leaving it uncovered was a concurring proximate cause.

The court below on motion of defendant excluded the testimony of plaintiff and entered a peremptory instruction in behalf of defendant.

The decision of the court reversed the action of the lower court and held that the collision of the two cars and the subsequent veering of one of these automobiles towards appellant was a contributing factor but not the sole proximate cause. The action of both the town and the driver of the automobile constituted *causa causans*.

The court further held that the catch basin in question was not a remote cause but a continuing and ever present one into which an unwary pedestrian might stumble under many different circumstances. It was, therefore, present and continuing, contributing and concurring with the act of the driver of the automobile.

B. CARRIERS

In *Alabama Great Southern R. R. v. Taylor*¹¹ appellee, a resident of Meridian, while a passenger on one of appellant's trains, destination, Meridian, sustained a cut in one of her eyes when struck by bits of window glass broken by a stone thrown by someone outside of the train. Notified of her injury, the conductor, according to appellee's testimony, promised that he would send a company physician to attend her at her home in Meridian as soon as she arrived there. Appellee was met at the railroad station by a friend who took her immediately home where she awaited the arrival of the physician for more than two hours. Testimony somewhat at variance with that offered by appellee was offered by appellant.

The complaint in this case is for not sending a physician to treat the appellee at her home in pursuance of the promise of the conductor so to do.

In reversing the judgment of the lower court and entering judgment for the appellant, the court held that the "common humanity doctrine" runs no further than the reasons which give it existence. That is, when a passenger becomes injured while en route on a common carrier, regardless of the negligence of the carrier, a duty is owed the passenger by the carrier to observe such reasonable care and attention as common humanity

¹¹190 Miss. 69, 199 So. 310 (1940).

would deserve. But upon reaching the intended destination the court held that the passenger has there actually reached the care of family or friends and that there the duty of the carrier as respects the uses of common humanity ceases, and the duty becomes that of the family or friends. Thus, the doctrine is not enlarged to the extent of including any promise as might have been made by the conductor, which promise, as is set forth in the opinion, is a personal one and does not bind the carrier; that is, where the conductor goes beyond the duty imposed by the doctrine of common humanity as binding upon the carrier, for the authority so to do does not extend beyond the time or place within which the doctrine is operated.

Appellee recovered judgment in the lower court for \$1500.00 against Teche Lines, Inc., as damages for mental pain and suffering caused her because of refusal of bus driver to accept her, infant in arms, as a passenger on an overcrowded bus from Hazlehurst to Jackson for the purpose of keeping a one o'clock appointment with a physician treating her child. Passage was refused appellee because of an overcrowded condition of the bus and because of the fact that the bus driver believed another bus immediately following on the same schedule would offer accommodations.¹²

The court held that regardless of the fact that this particular common carrier is operated under the supervision of the Public Service Commission, still it reserves unto itself full control and discretion as to the seating of passengers and that it was a reasonable requirement, under the circumstances, that appellee should be asked to wait for the extra bus which was then thought to be following immediately behind the first one and on the same schedule to take care of the overflowing crowd. And this, despite the fact that contrary to the bus driver's reasonable expectations it later developed that the second bus was more than one and one-half hours late. The court further held that no physical injury or inconvenience is shown to have been suffered by the appellee herself and that the suit is brought in her own right alone.

In reversing the judgment of the lower court and entering judgment for the appellant, the court pointed out that the peremptory instruction for a directed verdict requested by the appellant below should have been granted.

C. Food

In the case of *Elmore v. Grenada Grocery Co.*¹³ plaintiff brought action against defendant, Grenada Grocery Company, a domestic corporation, wholesale distributor of numerous lines of groceries, for damages for an illness allegedly sustained by virtue of eating a portion of the con-

¹²Teche Lines, Inc. v. Lott, 189 Miss. 490, 198 So. 292 (1940).

tents of a can of sliced pineapple containing a foreign substance. Plaintiff had purchased the can of pineapple from a local retailer who in turn had purchased same from Grenada Grocery Company.

Defendant admittedly did not prepare or pack the can of pineapple but was the exclusive distributor for that particular brand in the territory where the retail purchase was made. The manufacturer of the can of pineapple was not joined in the suit.

Plaintiff relied upon the case of *Swift & Co. v. Hawkins*,¹⁴ but the court held that The Volunteer Stores, Inc., of America, manufacturer and packer of the particular can of pineapple in question, was not sued or joined as defendant and therein lay a sufficient distinction between the instant case and the *Swift & Co.* case. The court affirmed the action of the lower court in granting a peremptory instruction in behalf of the defendant, Grenada Grocery Company.

In *Coca Cola Bottling Works, Inc. v. Petty*¹⁵ appellee sued appellant, manufacturer and bottler of coca cola, for damages allegedly sustained in drinking bottle of coca cola containing animal matter. The party from whom the bottle was purchased was not joined as defendant. From a verdict resulting in favor of plaintiff below, appellant complains that the lower court should have granted its request for a directed verdict and further that error appeared in an instruction granted the appellee and that the damages were excessive.

The opinion sets forth questions and answers as offered in evidence tending to show that the customary method employed by the appellant in bottling its drink. The doctrine of *res ipsa loquitur* was invoked, and the court held that the evidence failed to disclose that the particular bottle in question was filled in the manner described as the customary method of filling the bottles and that the evidence failed to show that all coca cola bottled by appellant was bottled in the manner as set forth as its usual and customary method.

In analyzing the evidence further, the court pointed out that the animal matter would not have been in the bottle had appellant's employees exercised due care in operating the bottling machine and inspecting the bottles after the coca cola was placed in them and that, therefore, the court below committed no error in refusing appellant's request for a directed verdict. As to the objection on the instructions offered, the court held that appellant did not complain of the instruction to which it objected

¹³189 Miss. 370, 197 So. 761 (1940).

¹⁴174 Miss. 253, 164 So. 231 (1935).

¹⁵190 Miss. 631, 200 So. 128 (1941).

for the reason that appellant itself requested and obtained from the court an instruction which permitted the jury to do precisely that which the one objected to permits. In affirming the judgment of the lower court the damages were held to be not excessive.

In *Hattiesburg Coca Cola Bottling Co. v. Cawley*¹⁶ plaintiff below was awarded judgment against defendant for alleged breach of implied warranty as manufacturer of beverage. Plaintiff allegedly swallowed a roach contained in bottled coca cola and nausea followed.

The court held that an issue of fact was presented and that no error resulted in the trial of the case. However, the court further held that an award of \$750.00 was excessive and that any amount exceeding half the sum so awarded went beyond mere compensation. The case was affirmed with *remittitur*.

D. AUTOMOBILES

The facts in this case are rather unusual and for complete review of the case facts in detail must of necessity be set forth.¹⁷

Tinnin filed suit in the circuit court of Lauderdale County against Grady Brand, trading as 630 Taxi Cab Company and against Chester Gordon, a taxi driver. Plaintiff sought recovery of damages for personal injuries received as a result of being struck by taxi cab driven and owned by Gordon. From a verdict in favor of plaintiff for the sum of \$5,000.00 Brand and Gordon appealed, assigning as error that the uncontradicted evidence showed that the sole proximate cause of Tinnin's injuries was his own negligence. Brand appealed upon the ground that a verdict should have been directed in his favor for the reason that the uncontradicted evidence showed that at the time of the injuries Gordon was acting without the scope of his agency and not in furtherance of Brand's business.

Brand operated in the City of Meridian the 630 Taxi Cab Company and maintained a taxi depot and several contact stations scattered about the city. The drivers owned individually the cabs driven by them and paid Brand the sum of \$1.25 per day for each day that their automobile was in service. The drivers received all fares from the patrons. On each one was inscribed the insignia of the 630 Taxi Cab Company. Brand maintained the terminal and contact stations for the benefit of the drivers as well as the general public. Each driver had the right to, and often did, use his taxi cab for his private business, including social purposes.

On the day of appellee's injury, one Mrs. Swan called for a taxi cab, and Gordon responded to the call. It developed that Mrs. Swan and her

¹⁶2 So. (2d) 143 (Miss. 1941).

¹⁷Brand v. Tinnin, 190 Miss. 412, 200 So. 588 (1941).

sister, Mrs. Moore, lived together and that Mrs. Moore and Gordon were very friendly. Upon reaching the home Gordon invited Mrs. Moore and the children to accompany him in the taxi cab hired by Mrs. Swan to take her down town. Mrs. Moore accepted the invitation upon the condition that she be returned to her home by Gordon, to which Gordon was agreeable. After depositing Mrs. Swan down town, and upon payment of the fare by Mrs. Swan, the automobile of Gordon on its return trip with Mrs. Moore, struck and injured plaintiff below.

The court held that the court below erred in refusing the request of Brand for a directed verdict on the ground that the evidence showed that at the time of the injury that Gordon was acting without the scope of his agency and not in furtherance of Brand's business. At the time of the accident the call was a social one in so far as Gordon was concerned, and he was serving no one except himself and Mrs. Moore and was breaching no duty owed Brand. The crux of the case appears to be that Gordon deviated from his regular, routine line of duty and business and in such devious route suffered the accident with Tinnin.

Gordon's only request for reversal was based upon certain alleged errors in instructions. However, the court declined to take cognizance of these assigned errors and affirmed the judgment as to Gordon but reversed, entered judgment, and dismissed the suit as to Brand.

In *Lee v. Reynolds*¹⁸ Lee sued in the circuit court of Coahoma County to recover damages sustained in an automobile collision. The jury rendered a verdict for \$100.00, and from a judgment denying plaintiff's motion to set aside a verdict and grant a new trial as to damages only, plaintiff appealed. There was no cross-appeal by defendant.

Plaintiff was driving on highway 61 near Clarksdale when his automobile ran out of gasoline and stopped. With the aid of other passengers he attempted to push the car toward the shoulder to the right of the road. Defendant, proceeding in the same direction on the road, crashed into the rear of plaintiff's car causing serious injuries both to the automobile and to plaintiff. The time was approximately 8 o'clock in the evening in May, 1940. The rear lights of plaintiff's car were burning. The lights on defendant's car had a range of some five or six hundred feet, and defendant testified that he did not see plaintiff's car until within some twenty-five or thirty feet, due to the glare of an approaching car.

The evidence revealed that plaintiff suffered a compound fracture of the right leg, severe cuts and bruises on the left leg, loss of time, a doctor's bill of \$25.00, and damages to plaintiff's car in the amount of \$172.45.

¹⁸190 Miss. 692, 1 So. (2d) 487 (1941).

Further, plaintiff was forced to remain in bed, leg in cast, for approximately a month and was incapacitated for over seventeen weeks.

The court held that the liability of defendant was readily apparent and that when the extent of the injuries to plaintiff and property damage and other losses are considered and computed, even conservatively, by any standard, a total must be reached which when compared to the jury verdict of \$100.00 would be grossly disproportionate regardless of any contributory negligence attributable to plaintiff. The opinion is quite clear and in no uncertain terms states that regardless of the degrees of negligence properly attributable to the respective parties, the verdict was so grossly inadequate as to evidence either prejudice or an inadequate estimate of the total injuries or an unjust appraisal of the degree to which the plaintiff's negligence, if any, contributed to such injuries.

It is interesting to note here that the court held defendant was presumed to have seen what he should have seen since his headlights threw a beam five hundred feet, and he did not see appellant until within thirty feet, citing the case of *Graves v. Johnson*.¹⁹ The case was reversed and remanded for hearing as to damages only.

One Brown instituted suit against Bond for damages sustained by virtue of collision with truck owned by Bond and operated by one Wileman, employee of Bond.²⁰ The court below entered a peremptory instruction in favor of Bond on the ground that Wileman was not acting within the scope of his employment or about the business of Bond when the accident occurred, and it is only the correctness of this ruling in question here.

The proof was ample to show that Wileman was negligent. The accident occurred as Wileman was on his way home from work, truck empty, for the purpose of delivering his wife groceries and spending the night. After quoting at length from the testimony, the court, in affirming the action of the lower court in granting the peremptory instruction, held that Wileman was not engaged in and about the business of the master at the time of the accident and that, therefore, Bond was not chargeable with Wileman's negligence.

E. HOTELS

In *Rose v. Rather*²¹ appellant entered suit against Rather, owner-lessor of a hotel building for injuries suffered in a fire which consumed the building.

¹⁹179 Miss. 465, 176 So. 256 (1937).

²⁰Brown v. Bond, 190 Miss. 774, 1 So. (2d) 794 (1941).

²¹190 Miss. 105, 199 So. 299 (1940).

Rose was an occupant of a room in the hotel and was injured in attempting to escape by means of a window and a rope improvised from bed clothes when he found that he could not gain exit by means of his door and the hall because of flames. The lessee-operator of the hotel was not joined as party defendant, and plaintiff claimed damages because of improper construction of the hotel.

Appellant urged that he was entitled to recover because Section 4693, Mississippi Code of 1930, had not been complied with. This section requires the proprietor of hotels to provide an alarm bell at or near the office to be used in awakening the inmates in case of fire.

In affirming the judgment of the lower court it was pointed out in the opinion that the responsibility of the owner of the real property, when Sections 4688 to 4695, Mississippi Code of 1930, are considered, is only in respect to those requirements which appertain to permanent fixtures. The alarm bell mentioned in Section 4693, Mississippi Code of 1930, was held not to be of this nature, and, therefore, the owner of the realty was not chargeable.

F. NUISANCE

One Holmes instituted suit against Davis for injunction against establishment of a funeral home in a residence building on a lot adjoining complainant's residence.²²

The area in which complainant's house was located was composed of eight blocks in which there were two grocery stores, one filling station in connection with one of the grocery stores, and a small delicatessen shop. In this area there are approximately seventy-five residences. Complainant sought an injunction on the ground that the area in question was essentially residential in character and that an establishment of a funeral home thereon would constitute a nuisance. The court affirmed the finding of the lower court in that the area in question was essentially residential in character and that the establishment of a funeral home therein would constitute a nuisance.

In *State ex rel. Whall v. Saenger Theatres Corp.*²³ Whall, an individual, sued in the name of the state the defendant to recover \$40.00 paid by himself in admissions to defendant's theatres and the sum of \$2,960.00, which other parties had from time to time paid for admissions and which had been assigned to Whall under Section 1826, Mississippi Code of 1930, and to abate as a public nuisance under Chapter 341, Mississippi Laws of 1938, the practice of "bank nite".

²²Davis v. Holmes, 189 Miss. 554, 198 So. 25 (1940).

²³190 Miss. 391, 200 So. 442 (1941).

The question as to whether or not Whall could maintain the action in the name of the state arose for the first time, and the court held that the action was properly maintainable by Whall, citing in support of this position the case of *Caravella v. State ex rel Holcomb*.²⁴

With reference to abating the practice of "bank nite" as a nuisance, the court pointed out that Chapter 341, Mississippi Laws of 1938 was penal in nature and that, therefore, construction thereof must of necessity be strict. With reference to the nuisance phase of the case, the court confined its opinion strictly to whether "bank nite" was a nuisance under this statute. Since "bank nite" was not enumerated as one of the offenses abatable under the statute, the court held the same was not a nuisance under this law.

The question as to whether or not the "bank nite" scheme was a lottery under the criminal law of Mississippi was omitted from the opinion.

The court affirmed the action of the lower court in sustaining the demurrers of defendant to complainant's bill.

G. LIBEL AND SLANDER

In the case of *Truckers Exchange Bank v. Conroy*²⁵ the cause of action arose by virtue of a letter charging appellee with mortgaging certain property, real and personal, to appellant which she did not own at the time of the mortgage. Appellee filed suit and charged that the appellant had altered the instruments after the signature had been affixed and delivered to appellant.

Mr. Chief Justice Smith in rendering the controlling opinion, which reversed the judgment of the lower court, pointed out that the peremptory instruction as requested by appellant should have been granted for the reason that in a civil case where there is charged fraud involving turpitude or the commission of a crime, the act constituting the fraud must be proved by clear and convincing testimony. The opinion holds that the evidence does not justify a consideration by the jury and is too weak to merit consideration when faced with the nature of the charge together with the contradicting evidence of the opposing side. The opinion further holds that ordinarily such evidence is for determination of the jury, but, when it manifestly falls below this standard and is not of such a real and substantial nature that impartial men of sound judgment could reasonably believe it and prudently act therein, then the trial judge should not allow the case to go to the jury but should direct them to return a verdict for the opposing party.

²⁴185 Miss. 1, 186 So. 653 (1939).

²⁵90 Miss. 242, 199 So. 301 (1940).

In this case there is an extremely interesting dissenting opinion rendered by Justice Ethridge wherein the position is taken that the case should have gone to the jury and that it was not one for the granting of a peremptory instruction. Here the distinction between a case in which a peremptory instruction is proper and a case where the verdict of the jury should be set aside as against the overwhelming weight of the evidence is pointed out, and the dissenting opinion sets forth that the degree of proof to entitle a party to a peremptory instruction is very much greater than that necessary to entitle him to the verdict of the jury. Although the dissenting opinion does not say whether the case is one whose verdict is to be set aside as against the overwhelming weight of the evidence, still it holds that the case is such as to be beyond the province of the court in directing that a peremptory instruction be granted.

H. RAILROADS

In *Gordon v. Illinois Central R. R.*²⁶ plaintiff appealed from a ruling of the trial court excluding his evidence and directing a verdict in favor of defendant, which denied him recovery of damages for personal injuries sustained when he was caused to fall when walking at night across the railroad track at the intersection of a fifty foot street. Defendant was engaged in excavating cinders from, on and between cross ties at the crossing for the purpose of replacing the same with other material. The street crossing was barricaded on both sides and these barricades were lighted.

The ground of alleged negligence relied on is the failure of the defendant to have the premises lighted at or on the crossing proper so as to give additional warning to that afforded by the lighted barricade.

The court held that due notice was afforded to pedestrians under the circumstances to apprise them of the fact that the crossing was not open at that time for indiscriminate use as it had been theretofore, and that one leaving the route or path provided for pedestrians would do so at his peril after passing the lighted signals of warning hanging on the barricade across the street along which he was then walking.

In the case of *Kurn v. Fondren*²⁷ appellee obtained judgment in the lower court for damages sustained because of loss of property by fire allegedly started by sparks from locomotive engine of defendant. The question presented to the court in this case is the interesting one of circumstantial evidence. There was no direct evidence that the fire was started by sparks from defendant's locomotive.

²⁶1 So. (2d) 772 (Miss. 1941).

²⁷189 Miss 739, 198 So. 727 (1940).

The court held, in affirming the judgment of the lower court, that the rule in this state is that when the circumstantial evidence justified the jury in finding the inference to be stronger and more probable that the fire was set by a railroad locomotive than that it was set out from another cause, the question of the fire's origin was for the jury. This being especially true where it is not incumbent upon appellee to show negligence on the part of the railroad company. The court held that the case was one properly to be submitted to the jury and that there was no error.

In *New Orleans & N. E. R. R. v. Burge*²⁸ appellee, driving a truck, collided with the side of a train at a public crossing. He received damages for injuries suffered therein charging that the locomotive whistle was not blown or the bell rung as the train approached the crossing. The accident occurred at night at a time when there was a slight rain, and the statutory demands as to the locomotive's light were not in question.

The court held, in reversing the judgment of the lower court and entering judgment for appellant, that if the roar of the train in the quiet of the night which was of such intensity that it was heard a mile away and the gleam of a large electric headlight in the drizzling rain were insufficient to make the slightest impression on the sensibility of appellee until he was within five feet of the train, then the conjecture or possibility that the ringing of the bell would have earlier aroused him is of no avail. The court further held that the facts demonstrated that appellee was both deaf and blind to everything except what he himself was doing and that the failure of appellant to ring the bell disappears as a substantial factor in bringing about the injury.

In this case there was a strong dissenting opinion by one of the Justices which held that of necessity the majority opinion drew upon conjecture to construct a basis for its reasoning in holding that the ringing of the bell would not have altered the consequences nor prevented the accident. The dissenting opinion strongly indicated that it was proper for the jury to determine whether or not the non-ringing of the bell was a proximate cause of the accident and that the same should have been submitted for their consideration.

In the case of *Columbus & G. R. R. v. Robinson*²⁹ there was a judgment in favor of appellee for damages for death alleged to have been caused by the concurrent negligence of defendants, Standard Oil Company of Kentucky, W. C. Hester, and Columbus & G. Railway. Negligence is charged when deceased fell or jumped from a truck driven by Hester as it crossed the railroad in front of a moving train.

²⁸2 So. (2d) 825 (1941).

²⁹189 Miss. 675, 198 So. 749 (1940).

Hester, according to the proof, had entered into a contract with the Standard Oil Company of Kentucky to do certain work as an independent contractor.

The lower court granted appellee a peremptory instruction that the failure to maintain a stop sign at the railroad crossing was negligence and gave appellee other instructions to the effect that if the railway company was guilty of any negligence the jury should find for the plaintiffs.

The court held in reversing and remanding the case as to the railway company and rendering judgment for the Standard Oil Company that it was error to grant such peremptory instruction, especially in view of other instructions given to the effect that if the railway company was guilty of negligence the jury should find for the plaintiffs.

The Standard Oil Company of Kentucky was found to have a contract with Hester establishing the relationship of an independent contractor and, therefore, the Standard Oil Company was not liable for the death of deceased.

X.

STATISTICAL SURVEY

*Richard Lord**

TABLE I

This table is a general summary of the work done by the Mississippi Supreme Court during the September 1940, and March 1941, terms. It was compiled from the original records of the court by Hon. Tom Q. Ellis and Mrs. D. F. Fondren, Jr., Clerk and Deputy Clerk, respectively, of the Supreme Court. The writer gratefully acknowledges the assistance given him by the compilers.

Cases on the Docket at the Opening of September 1940 Term.....	141
Cases on Docket at Adjournment June 1941.....	53
Motions Handled by the Court.....	99
Cases Decided Without Written Opinion.....	105
Cases Disposed of for Failure of Appellant to Prosecute Appeal.....	38
Suggestions of Error Filed.....	117
Suggestions of Error Overruled.....	115
Suggestions of Error Pending on Adjournment.....	10
Cases Decided in which Opinion was Written.....	297

*Note and Case Editor, Mississippi Law Journal. The compiler gratefully acknowledges the assistance rendered by Mr. Robert C. Cannada, Business Manager of the Mississippi Law Journal.

Opinions Written on Suggestion of Error.....	8
Opinions Written on Motions.....	14
Cases Disposed of on Motion (Motions to Dismiss, Cases Compromised and Settled, Motions to Docket and Dismiss, etc.).....	48
Total Cases Handled by the Court.....	476

TABLE II

This table shows the disposition of the cases upon appeal and the Justice who wrote the opinion. It and the subsequent tables appearing herein were compiled from the cases carried by the Southern Reporter and contain only the cases therein reported.

	Anderson, P. J.	Ethridge, J.	Griffith, J.	McGehee, J.	McGowen, J.	Smith, C. J.	Alexander, J.	Roberts, J.	TOTAL
Affirmed	21	11	32	25	4	16	12	17	138
Affirmed & Remanded.....	—	—	—	3	—	—	2	—	5
Affirmed on Condition of Remittitur	—	1	1	—	—	—	1	—	2
Affirmed in Part and Reversed and Remanded in Part.....	—	—	—	1	—	—	1	—	2
Reversed and Remanded.....	2	4	12	18	4	10	8	3	61
Reversed and Rendered.....	3	4	9	9	6	5	4	4	44
Appeal Dismissed	—	1	2	—	1	—	—	—	4
Suggestion of Error Overruled	—	—	1	4	—	1	—	—	6
Motions Sustained	—	—	—	1	—	—	—	—	1
Motions Sustained in Part, Overruled in Part.....	1	—	—	—	1	—	—	—	2
Motions Overruled	1	—	1	—	—	2	1	1	6
Affirmed in Part and Reversed and Rendered in Part.....	1	—	1	1	—	1	—	2	6
Suggestion of Error Sustained	—	—	—	—	—	—	1	—	1
TOTALS.....	29	20	59	62	16	35	30	27	278

TABLE III

The table is a topical analysis of the cases by reference to the Justice writing the opinion. It should be borne in mind while consulting this table that the topic under which a case has been entered is not necessarily the only point involved or decided in the case, but it was necessary in many cases to draw an arbitrary line for the sake of tabulation.

	Anderson, P. J.	Ethridge, J.	Griffith, J.	McGehee, J.	McGowen, J.	Smith, C. J.	Alexander, J.	Roberts, J.	TOTAL
Agency	2	—	—	1	—	1	—	—	4
Appeal & Error	1	1	5	5	2	2	2	3	21
Attorney & Client	—	—	—	1	—	—	—	—	1
Automobiles	—	—	—	—	—	—	1	—	1
Banks & Banking	—	—	—	—	—	1	—	—	1
Bills & Notes	—	—	1	1	—	1	—	—	3
Carriers	—	—	3	3	—	1	—	—	7
Constitutional Law	—	—	—	1	—	1	—	—	2
Contracts	—	—	1	2	—	—	—	4	7
Corporations & Partnerships	—	2	1	—	—	1	1	—	5
Counties & States	1	—	2	2	—	1	—	—	6
Criminal Law	8	7	8	11	1	10	6	—	55
Damages	—	—	—	—	—	—	—	—	—
Elections	—	—	3	—	—	—	—	—	3
Eminent Domain	—	—	—	—	—	1	—	—	1
Equity	1	—	—	1	—	—	—	—	2
Evidence	—	2	2	1	1	1	1	1	9
Homesteads	—	—	1	—	—	—	—	—	1
Infants	—	—	—	—	—	—	—	—	—
Insurance	1	—	—	2	2	3	1	1	10
Intoxicating Liquors	—	—	—	2	1	—	1	—	4
Marriage & Divorce	—	—	1	1	—	—	—	—	2
Master & Servant	—	—	1	1	—	1	1	1	5
Mortgages	1	2	—	1	—	—	—	—	4
Municipal Corporations	3	—	—	1	—	1	—	—	5
Officers	1	—	1	1	—	—	—	1	4
Practice & Procedure	1	1	10	3	1	1	2	1	20
Railroads	—	—	2	1	1	—	—	—	4
Real Property	1	1	—	1	1	—	3	—	7
Remedies	—	1	1	1	—	1	—	1	5
Sales	—	—	1	2	—	—	1	—	4
Schools & School Districts	—	—	2	1	1	—	1	—	5
Statutes & Statutory									
Construction	1	—	2	1	2	—	1	2	9
Taxation	3	1	5	4	2	2	3	3	23
Torts	—	—	6	3	1	4	2	1	17
Trusts	—	—	—	—	—	—	—	—	—
Wills, Executors &									
Administrators	1	2	—	6	—	2	2	3	14

TABLE IV

This table shows dissents and special concurrences.

	Dissents with Opinion	Dissents Without Opinion	Concurs in Another Dissent	Concurs Specially with Majority	Partly Concurring, Partly Dissenting
Anderson	5	1	3	—	—
Ethridge	7	—	—	2	1
Griffith	1	—	1	1	1
McGehee	2	1	—	1	—
McGowen	—	—	1	—	—
Smith	11	1	1	4	3
Alexander	1	—	—	1	—
Roberds	2	1	3	—	—

TABLE V

This table includes only the cases that were reversed and shows the reason for reversal. It is evident that the classification, "Error as to Law," is sufficiently broad to include errors otherwise designated in the remaining subdivisions of the table. However, there is no overlapping, and this general classification as here employed includes only those errors not susceptible to more specific description.

Error as to Law.....	49
Motion for Directed Verdict Improperly Overruled.....	20
Verdict not Warranted by Evidence.....	15
Improper Admission of Evidence.....	7
Improper Instruction.....	6
Improper Exclusion of Evidence.....	4
Excessive Damages	1
Motion for Directed Verdict Improperly Sustained.....	3
Failure to Prove Venue.....	1

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EDITORIAL NOTE

THIS ISSUE. For four years now the first number of the new volume of the Mississippi Law Journal has been devoted exclusively to subjects of peculiar interest to Mississippi lawyers. These subjects are presented in the Journal under certain permanent department headings. Thus, each year there has been included a department which contains a review of the work of the Mississippi Supreme Court. Similarly, during the years in which the legislature is in session, the work of the Mississippi Legislature is summarized. From time to time articles appear devoted to certain Mississippi cases which are entitled to be known as leading cases, the department being known as Mississippi Leading Cases. Another department, made up of biographical sketches of Mississippi lawyers and statesmen, has been consistently included. This year a new department, titled Mississippi Legal History, is introduced. Under this department will be found an article setting out the history of the title to the lands of the Liquidating Levee Board, which lands at one time comprised a great part of the Yazoo-Mississippi delta. The article is reprinted with slight changes of form and subject matter from Volume Nine, *Publications of the Mississippi Historical Society*, and it well illustrates the type discussion which will be included in the department in the future. The editorial board hopes that next year a history of Mississippi's bond repudiation will be presented under this new department.

MISSISSIPPI LEADING CASES

"WHERE THERE IS A WILL, THERE IS A . . ." BURDEN OF PROOF; or WAS CORNELIUS SHEEHAN UNDULY INFLUENCED

THE CASE OF SHEEHAN V. KEARNEY

*L. A. Smith, Sr.**

In that inexhaustible repository of profound truths, the works of William Shakespeare, it is said that all the world is a stage and all the men and women are merely players, and that each in his time plays many parts. A wise old Persian, Omar Khayyam, was credited with writing:

"Life is like a snowflake on the river,
A moment white and gone forever."

Cornelius Sheehan played an important role in the business life at Meridian where he resided, and, although his mortal life is ended and like the snowflake on the river gone forever from mundane affairs, his act was the occasion of much agitation and controversy in American jurisprudence. The judicial consideration of his act produced from the Supreme Court of Mississippi the case of *Sheehan v. Kearney*¹ and the brilliantly reasoned opinion therein. Mr. Sheehan at the time of his death was a widower, the woman whom he led to the altar as a blushing bride having predeceased him; and, at the time of his death, about nine o'clock on the morning of July 29, 1893, he was without descendants. His only heirs at law were three brothers and one living sister. These brothers and this sister would have inherited his estate had he died intestate, but the paper writing propounded as the will of Mr. Sheehan in this litigation devised and bequeathed his estate to relatives of his deceased wife, and hence the litigation. Mr. Sheehan and his brothers and sister, as is so often the case in this world of movement and separation, had lost contact with each other to a very large extent, but Mr. Sheehan had maintained close association with the relatives of his deceased wife. He had prospered in life and left a comfortable estate, over which the litigation waged, having as its basis the validity of the alleged will of Mr. Sheehan, which disinherited his blood relatives and benefited his close associates among the relatives of his deceased wife. The alleged will made certain specific bequests and devises and also contained a residuary devise favoring others, all of them unrelated to Mr. Sheehan but related to his deceased wife. None of Mr. Sheehan's brothers nor his sister was left anything by this will, and, although he had been separated from these close relatives, there were other blood relatives with whom he had been closely thrown who were not re-

*Chancellor, 3rd Chancery District; Holly Springs, Mississippi.
¹82 Miss. 688, 21 So. 41, 35 L.R.A. 102 (1896).

membered in his will. With some of his wife's relatives, beneficiaries under the will, Mr. Sheehan had closer association than with others. He lived in the house with three of them as their guardian, all of whom were beneficiaries of his will. In this situation the brothers and sister opposed the admission of the will to probate when it was offered by the beneficiaries thereof, leading to a contest in which the issue was whether or not the paper writing was in fact the last true will and testament of Cornelius Sheehan. Several interesting issues were decided in that lawsuit.

Incidentally, and as a matter of historic interest, it will be noted that the opinion in the case was delivered by Mr. Justice Whitfield on December 14, 1896, but the case was not reported until 1903. In the official report it is stated that the briefs of counsel had been withdrawn or lost from the record. However, the writer has been able to find both the original opinion and the briefs of counsel. A rather long opinion was written wholly in longhand by the learned Justice who delivered it. The assignment of errors was also written in longhand. The briefs were typewritten, one in blue ink and one in green ink. These details are quite sharply at variance with the present practice in the Supreme Court, especially the color of ink used in the briefs, no color but black ink being now permitted.

It will thus be seen that in the Supreme Court at the time this decision was rendered the court completely complied with the poetical admonition:

"Be not the first by whom the new is tried,
Nor yet the last to lay the old aside."

The Chancery Court of Lauderdale County gave a peremptory instruction to the jury to find for the proponents of the will, relatives of the alleged testator's deceased wife. The contestants, who were the three brothers and only sister of the alleged testator, had also asked but had been refused a peremptory instruction in their favor. The contestants appealed to the Supreme Court, where the case was reversed and remanded for a new trial, because the court held that it was peculiarly a case for the jury under proper instructions from the court as to the law, stating that a verdict for either party on the testimony in the case should not have been disturbed. And thus emerged into judicial history the case of *Sheehan v. Kearney*, *supra*.

Several important issues were involved in the litigation: First, whether the alleged will of Cornelius Sheehan was in fact ever signed by him at all, it being contended that what was called a signature was nothing more than an illegible scrawl. The Supreme Court held that this contention was not maintainable and discussed at length what it takes to make a valid signature. Secondly, it was insisted by appellants, "with great

wealth of learning and marked force of reasoning," that certain declarations of testamentary intention by Mr. Sheehan should not have been received into evidence at the trial of the case. That issue is quite extensively discussed in the opinion, the court holding that the declarations of a testator touching his testamentary intentions are admissible in evidence on the issue of testamentary capacity and undue influence, whether made before, at the time of, or after the execution of the will. In so holding, the Supreme Court of Mississippi took sharp issue with the position taken by Mr. Bigelow in his note on wills.²

The alleged will was also attacked on the ground that at the time it was made Mr. Sheehan lacked testamentary capacity, and that the alleged will was not his will but was the will of the beneficiaries substituted for his own as a result of their undue influence upon him.

The most interesting point in the case is who bears the burden of proof as to testamentary capacity and undue influence. And with the question of undue influence and burden of proof this article will largely concern itself.

The *Sheehan* case has been previously referred to in the Mississippi Law Journal in an elaborate note.³ The annotator propounds there this question: "Must the proponent show the absence of undue influence, or must the contestant establish its presence?" It is there stated that the latter proposition seems to be supported by the weight of authority, and probably the better reasoning, although the former also has its advocates. Among the cases holding that the proponent must show an absence of undue influence is *Sheehan v. Kearney, supra*. In other words, the commentator places Mississippi in the category of the minority view, but also asserts that the view of the majority is supported by the better reasoning. In this conclusion the author of this article disagrees with the commentator. To find some of the decisions of the courts of America which were challenged by the pronouncement of the Mississippi Supreme Court on both testamentary capacity and undue influence, reference may be had to the elaborate notes found in connection with *Prentis v. Bates*,⁴ which deals with testamentary capacity; and in connection with *Baldwin v. Parker*,⁵ showing the great conflict of authority as to undue influence.

At the time the *Sheehan* case was decided by the Supreme Court of Mississippi a great majority of the jurisdictions of the United States was committed to the rule that insanity or incapacity of the testator alleged

²1 JARMAN, WILLS (6th Am.ed. 1873) 71.

³Note 1934 6 MISSISSIPPI LAW JOURNAL 403.

⁴93 Mich. 234, 53 N.W. 153, 17 L.R.A. 94 (1892).

⁵99 Mass. 79, 96 Am. Dec. 697 (1868).

to defeat the probate of his will must be proved by the contestant when the formal execution of the will has been duly proved.

At that time, however, the rule announced in the Sheehan case had been adopted by many courts,⁷ and each of these conflicting rules has been frequently declared by the court adopting it to be sustained by the weight of authority.

The Sheehan case decides with reference to the burden of proof as to undue influence that it is on the proponents of a will on an issue *devisavit vel non*, and also the burden of showing testamentary capacity, but holds that the proponents make out a *prima facie* case by showing the due probaton of the will. The opposite view, of course, is that the contestants must show the presence of testamentary incapacity and of undue influence.

Mr. Wigmore puts the problem this way:

"In the proof of undue influence negating the capacity of a testator, there is a difference of judicial opinion, as in the case

⁶*Eastis v. Montgomery*, 93 Ala. 293, 9 So. 311 (1891); *O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322 (1884); *Cotton v. Ulmer*, 45 Ala. 378, 6 Am. Rep. 703 (1871); *Stubbs v. Houston*, 33 Ala. 555 (1859); *McCulloch v. Campbell*, 49 Ark. 367, 5 S.W. 590 (1887); *Jamison v. Jamison's Will*, 3 Houst. 108 (Del. 1864); *Duffield v. Morris*, 2 Harr. 375 (Del. 1832); *Chandler v. Ferris*, 1 Harr. 454 (Del. 1832); *Stephenson v. Stephenson*, 62 Iowa 163, 17 N.W. 456 (1883); *Brown v. Ward*, 53 Md. 376 (1880); *Taylor v. Creswell*, 45 Md. 422 (1876); *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666 (1868); *Baxter v. Abbott*, 7 Gray 71 (Mass. 1856); *Brooks v. Barnett*, 7 Pick. 94 (Mass. 1828); *Perkins v. Perkins*, 39 N.H. 163 (1859); *Pettes v. Bingham*, 10 N.H. 515 (1840); *In re Will of Lee*, 46 N.J.Eq. 193, 18 Atl. 525 (1889); *McCoon v. Allen*, 45 N.J.Eq. 708, 17 Atl. 820 (1889); *Elkinton v. Brick*, 44 N.J.Eq. 154, 15 Atl. 391, 1 L.R.A. 161 (1888); *Turner v. Cheesman*, 15 N.J.Eq. 243 (1857); *Gable v. Grant*, 3 N.J.Eq. 629 (1835); *Sloan v. Maxwell*, 3 N.J.Eq. 563 (1831); *Day v. Day*, 3 N.J.Eq. 549 (1831); *Christman v. Christman*, 16 Or. 127, 18 Pac. 6 (1888); *Greenwood v. Cline*, 7 Or. 26 (1879); *Grubbs v. McDonald*, 91 Pa. 236 (1879); *Egbert v. Egbert*, 78 Pa. 326 (1875); *Thompson v. Kymer*, 65 Pa. 368 (1870); *McMasters v. Blair*, 29 Pa. 298 (1857); *Kinloch v. Palmer*, 1 Mill. Const. 216 (S.C. 1817); *Dean v. Heirs of Dean*, 27 Vt. 746 (1855); *Allen v. Griffin*, 69 Wis. 529, 35 N.W. 21 (1887); *Groom v. Thomas*, 2 Hagg. Ecc. 433, 162 Eng. Reprint 914 (1829); *Clark v. Cartwright*, 1 Phillim. 90, 161 Eng. Reprint 923 (1793).

⁷*Knox's Appeal*, 26 Conn. 20 (1857); *Constock v. Hadlyme Ecclesiastical Society*, 8 Conn. 254, 20 Am. Dec. 100 (1830); *Evans v. Arnold*, 52 Ga. 169 (1874); *Herbert v. Berrier*, 81 Ind. 1 (1881); *Barnes v. Barnes*, 66 Me. 286 (1876); *Cilley v. Cilley*, 34 Me. 162 (1852); *Gerrish v. Nason*, 22 Me. 438, 39 Am. Dec. 589 (1843); *Crownshield v. Crownshield*, 2 Gray 524 (Mass. 1854); *Phelps v. Hartwell*, 1 Mass. 71 (1804); *Layman's Will*, 40 Minn. 371, 42 N.W. 286 (1889); *Seebrock v. Fedawa*, 30 Neb. 424, 46 N.W. 650 (1890); *Kingsley v. Blanchard*, 66 Barb. 317 (N.Y. 1860); *Beazley v. Denson*, 40 Tex. 416 (1874); *Renn v. Samos*, 33 Tex. 760 (1870); *Denny v. Penny*, 60 Vt. 524, 12 Atl. 108 (1888); *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359 (1870); *McMechen v. McMechen*, 17 W.Va. 683, 41 Am. Rep. 359 (1881); *Silverthorne Will*, 68 Wis. 372, 32 N.W. 287 (1887). There were other cases which, for the sake of brevity, will not be listed here. The list of all these cases on an issue of testamentary capacity will make it unnecessary to cite the cases on the issue of undue influence and the burden of proof thereof which are set forth under the case of *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Dec. 697 (1868), as the cases are listed for the purpose of showing the sharp division on the two questions.

of insanity . . . , but here it goes back to the main burden of persuasion; i.e. by one view, the voluntariness of the testator's act is a part of the proponent's case, and with the jury he has the risk of non-persuasion; by the other view, the fact of undue influence is treated as in the nature of a defensive plea of the contestant, and therefore to be proved as a part of the case."⁸

In the *Sheehan* case the rule on the matter of the burden of proof is set forth by Judge Whitfield as follows:

"The view we take, that the burden of proof as to undue influence,—that is better phrased, that the testator executed the will freely and voluntarily,—is upon the proponents throughout the trial of an issue *devisavit vel non*, is, we think, meant to be declared by our statute, and is in harmony with our decisions along this general line, as for instance, as to the burden of proof of sanity being on the State in criminal trials."⁹

It now becomes of interest to inquire as to what is meant by the burden of proof. The term has been variously defined by our court. The term "burden" or "burden of proof" is frequently used to signify the burden of meeting a *prima facie* case rather than the burden of producing a preponderance of the evidence.¹⁰

Wigmore says:

"The term, *prima facie* evidence, or *prima facie* case, is used in two senses, (1) in discussing presumption, the term *prima facie* is sometimes used as equivalent to the notion of a presumption, even in the strict sense of the ruling of a judge putting upon the opponent the duty of producing evidence. In other words, the term is thus applied to the stage of the case where proponent, having the burden of proving the issue (i.e. the risk of non persuasion of the jury) has not only removed after sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, by means of the presumption, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence."¹¹

Another statement, which goes to the effect of the *prima facie* case, unless something is done by the opposite party, announces that where the party having the burden of proof gives *prima facie* evidence of fact, the adverse party has the burden to show a distinct proposition avoiding the effect of it.¹² Thus, of course, where the proponent introduces the will

⁸⁹ WIGMORE, EVIDENCE (3d. ed. 1940) §2502.

⁹⁸² Miss. 688, 701, 21 So. 41, 46 (1903).

¹⁰Alabama & V. Ry. v. Groome, 97 Miss. 201, 52 So. 703 (1910).

¹¹⁵ WIGMORE, EVIDENCE (2d. ed. 1923) §2494.

¹²Harris v. Sims, 155 Miss. 207, 124 So. 325 (1929).

¹³For a full discussion of the burden of proving undue influence see 6 MISSISSIPPI LAW JOURNAL 403. However, it has been pointed out previously that the view of the author of that note does not coincide with that of this writer.

and the record of probate in common form, he has established a *prima facie* case but has not relieved himself of the burden of proof which continues on him throughout the trial, although he has of necessity forced upon the antagonist the need of overturning or avoiding the *prima facie* case. When this is done, then the proponent of the will, still having the burden of proof, must rebut any change in the status of the proof or its effect brought about by the introduction of opposite testimony, and, failing to do so, cannot prevail in the lawsuit.¹³

People in their fallibility are forced to have recourse to what is called a presumption, that is, an assumed conclusion from common experiences of ordinary men. One presumption is that a decedent is presumed to have died intestate.¹⁴ This presumption grows out of the well known negligence of ordinary men and women to make a will. When Mr. Sheehan died, therefore, he was presumed to be intestate, and the proponents produced a paper writing alleging it to be his last will and testament. It will be noted that the will must be demonstrated to have been his last testamentary disposition and not one of several selected by the proponents. In addition to these two things, it must be demonstrated that he legally executed the document as his last true will and testament. Also he must have been twenty-one years of age. All these things imply that he was of sound and disposing mind and memory and acted freely and voluntarily. When the will is admitted to probate in common form, these things are established by an interlocutory decree, but may be put again in issue upon a trial *devisavit vel non*, in which both the probate and the will make out the *prima facie* case.

It will be remembered that in the quotation from Judge Whitfield's opinion in the *Sheehan* case, he based the ruling of the court on the statute and on decisions which were along analogous lines. At the time the case was decided it had already been held that the burden of proof as to the validity of the will is on the proponents thereof throughout the contest.¹⁵ This was held in 1892, but the case was not officially reported. It antedated the *Sheehan* case about four years.

The case under discussion was decided in 1896, and at that time the Code of 1892 was in force. Section 1824 of that code read as follows:

"On the trial of an issue made up to determine the validity of a will which has been duly admitted to probate, such a probate shall be *prima facie* evidence of the validity of the will."

¹⁴Smith v. Stanley, 159 Miss. 720, 132 So. 452 (1931).

¹⁵Brown v. Walker, 11 So. 724 (Miss. 1892).

This statute brought forward Section 1969, Mississippi Code of 1880, as follows:

"On the trial of an issue made up to determine the validity of a will, which has been duly admitted to probate, such probate shall be *prima facie* evidence of the validity of such will; and the testimony of such of those, whose testimony produced the probate of the will, as are dead, out of the state, or have since become incompetent, shall be admitted in evidence."

Under those statutes and under the present statute, which is Section 1611, Mississippi Code of 1930, the burden of establishing the absence of undue influence is upon the proponent of the will. The 1930 Code reads as follows:

"On the trial of an issue made up to determine the validity of a will which has been duly admitted to probate, such probate shall be *prima facie* evidence of the validity of the will."

This present statute is the same as the statute of 1892 when the *Sheehan* case was decided. The will in that case had been admitted to probate in common form, and the record of the probate and the will itself was introduced at the trial. Then the proponents rested. The contestants offered proof to establish undue influence, and the proponents offered proof in rebuttal to counterbalance or overthrow whatever change in the situation had been brought about by the evidence offered on behalf of the contestants. Throughout the trial the burden of proof was on the proponents, and this, as is shown above, is in accordance with the statutes cited. It will perhaps occur to the person pondering this matter, then, that many of the differences in the two lines of decisions are due to the differences in the statutes or to the absence of statutes. The principal case, however, was rendered on authority of the statute and also of logic, and was so brilliantly reasoned that to seek to improve upon it would be an attempt to paint the lily or to gild refined gold.

Since the *Sheehan* case was decided, as an illustration of the importance of this case to American jurisprudence, it has been cited by numerous cases on its various issues.¹⁶

¹⁶*Ellis v. Ellis*, 160 Miss. 345, 134 So. 150 (1931); *New Orleans & G. N. Ry. Co. v. Walden*, 160 Miss. 102, 133 So. 241 (1931); *Barnett v. Barnett*, 155 Miss. 449, 124 So. 498 (1929); *Simmons v. Dantzler*, 152 Miss. 428, 118 So. 829 (1928); *Smith v. Young*, 134 Miss. 738, 99 So. 370 (1924); *Mims v. Johnson*, 129 Miss. 403, 92 So. 577 (1922); *Sanders v. Sanders*, 126 Miss. 610, 89 So. 261 (1921); *Ward v. Ward*, 124 Miss. 697, 87 So. 153 (1920); *Moore v. Parks*, 122 Miss. 301, 84 So. 230 (1920); *Mallory v. Walton*, 119 Miss. 396, 81 So. 113 (1919); *Betlee v. Hirsch*, 115 Miss. 614, 76 So. 555 (1917); *Armstrong v. Walton*, 105 Miss. 337, 62 So. 173 (1913); *Miller v. Miller*, 96 Miss. 526, 51 So. 210 (1910); *Burrett v. Smith*, 93 Miss. 566, 47 So. 117 (1908); *Jourdan v. Bobbitt*, 91 Miss. 1, 45 So. 311 (1907); *Goldsmith v. Gates*, 205 Ala. 632, 88 So. 861 (1921); *Barksdale v. Bullinger*, 194 Ala. 624, 69 So. 891 (1915); *In re Wilkins Estate*, 94 Pac. (2d) 774 (Ariz. 1939); *Boone v. Boone*,

As an indication of how the reasoning behind the philosophy of the case is making itself felt in the consideration of the matter of undue influence and its burden, the following statements from well known text writers will suffice.

Warren says that this burden, irrespective of any statutory provision, should be upon the propounder of the will.¹⁷ This agrees with the reasoning in the *Sheehan* case outside of its foundation upon the Mississippi statute. In the *Columbia Law Review*¹⁸ Gifford cites with approval the *Sheehan* case, stating that although there is a conflict of authority on this question, it is to be hoped that those courts where the matter is not already settled by authority will incline to what is believed to be the simpler and sounder view, which is that fraud and undue influence are only facts used in evidence on the issue raised by the denial of the will; and that even where practice requires these facts to be specifically pleaded, such pleading shall be deemed to be required (as is true in England in the case of insanity or want of knowledge by the testator of the will's contents) only for the purpose of clearly specifying the facts of the defense, and not for the purpose of raising new issues, or of fixing the burden of establishing undue influence upon the contestant. He continues:

"As has been seen, the decisions to the contrary are due to two causes: first, to the failure to distinguish between the two meanings of the term 'burden of proof'; secondly, to the still graver error of failing to distinguish a case where a legal status is to be set aside from the case where the existence of a legal status is to be determined."¹⁹

Smoot, in his treatise referring to the subject under discussion, has the following to say:

"As opposed to the rule placing the onus of proving in the probate of a will upon a contestant, the courts of the greater number of states hold that the burden of proving the mental capacity of a testator rests upon the proponent of a will offered

114 Ark. 69, 169 S.W. 779 (1914); *Gilliam v. Burgess*, 169 Ga. 705, 151 S.E. 652 (1930); *Harley v. Caldwell*, 244 Ill. 448, 91 N.E. 654 (1910); *Johnson v. Johnson*, 134 Iowa 33, 111 N.W. 430 (1907); *In re Boland's Estate*, 137 La. 219, 68 So. 415 (1915); *In re Kubat's Estate*, 109 Neb. 671, 192 N.W. 202 (1923); *In re Sweeney's Estate*, 94 Neb. 834, 144 N.W. 902 (1913); *In re Paisley's Estate*, 91 Neb. 139, 135 N.W. 435 (1912); *In re Gordon's Estate*, 40 Nev. 281, 161 Pac. 717 (1916); *Wagner v. Chemical Bank & Trust Co.*, 276 N.Y.S. 717, 154 Misc. 123 (1934); *In re Heverner's Estate*, 118 Or. 308, 246 Pac. 720 (1920); *Tomilio v. Pisco*, 187 Atl. 86 (Pa. 1936); *Johnson v. Shaver*, 41 S.D. 585, 172 N.W. 676 (1919); *National Aid Life Association v. Murphy*, 78 S.W. (2d) 223 (Tex. 1935); *In re Mueller's Will*, 188 Wis. 813, 205 N.W. 814 (1925); *In re Iverson's Estate*, 39 Wyo. 842, 273 Pac. 684 (1929).

¹⁷Warren, *Fraud, Undue Influence, and Mistake in Wills* (1928) 41 HARV. L. REV. 309.

¹⁸Gifford, *Will or No Will?* (1920) 20 COL. L. REV. 862.

¹⁹Gifford, *Will or No Will?* (1920) 20 COL. L. REV. 862, 879.

for probate. It is not easy to determine exactly what theory this rule is founded upon, as most of the cases follow the rule without going at length into their reason therefor. It may be gathered, however, that the basis of the rule is the theory that one offering a will for probate necessarily affirms that the testator had testamentary capacity at the time of its execution, as a necessary ingredient of the making of the will, and hence that the testamentary capacity of the maker of the will becomes a part of the proponent's case, and must be proven along with the signing, attesting, etc. of the instrument."²⁰

By analogy, the *Sheehan* case must be sustained by the same reasoning as to the question of undue influence, because it is a part, a necessary ingredient, of making the will that it be done freely and voluntarily and that it is in truth the true will of the testator.

It now becomes important to determine just what constitutes undue influence. The law does not prohibit influence, but only undue influence, and in a legal sense influence is undue only when it induces a transaction which injures someone materially or which is intrinsically unfair or unconscientious.²¹ In a will contest, however, it must go even further than that before the influence becomes undue, and must reach to the point where the result is the substitution of another's will for the will of the alleged testator.²²

There are certain courses of conduct and certain circumstances which are so unfair or which contain such potentialities and implications of fraud and undue influence that the court takes them to be tantamount to proof on certain occasions. For instance, the will of a ward giving all or nearly all of her property to her guardian is *prima facie void*.²³ In the *Sheehan* case some of the beneficiaries of the will of Mr. Sheehan were his wards with whom he lived, and this, of course, was stressed in the trial of the case. Another situation frowned upon by the law in protection of an alleged testator against the effects of undue influence is when a will is made by a patient in favor of his physician, to the exclusion of relatives to whom ordinarily his property would go, with no reason appearing why such exclusion should occur. It is presumed on grounds of public policy that the will is void.²⁴ And it has been held that while the testator has the absolute power of disposing of his estate by will according to his settled convictions, yet, where the will is unreasonable and inconsistent with his duties with reference to his property and family, the proponents of the

²⁰SMOOTH, LAW OF INSANITY (1929) §530, p. 463.

²¹Gathings v. Howard, 122 Miss. 355, 84 So. 240 (1920).

²²Barnett v. Barnett, 155 Miss. 449, 124 So. 498 (1929).

²³Meek v. Perry, 36 Miss. 190 (1858).

²⁴Hitt v. Terry, 92 Miss. 671, 46 So. 829 (1908).

will must give some reasonable explanation of its unnatural character.²⁵ It is recognized in the experiences of men that the exercise of undue influence is a subtle and insidious process and very rarely capable of direct proof. Thus, in the effort to determine whether or not the paper writing offered is the true last will and testament of the alleged testator, freely and voluntarily made, the court will permit proof of undue influence by circumstantial evidence and will permit a wide range of inquiry.²⁶

In determining undue influence the jury may consider both the mental and physical condition of the decedent at and before the alleged signing of the will and also its naturalness or unnaturalness.²⁷ On the part of the proponent, it has been shown above in the *Sheehan* case that statements of the alleged testator as to the testamentary disposition of his property made before, at the time of, and after the signing of the will were admissible. They are admissible, of course, on the theory that they are part of the *res gestae*. The opposite, which would favor the contestants in a will contest, has been held not to be true. That is to say, the declarations of a testator shortly before death that he would make no will, have been held incompetent as evidence, being classed as hearsay.²⁸ Another means of contest which is barred by judicial holding, in spite of the fact that the will sought to be probated must be demonstrated to be the last will, is offering at the trial an alleged prior last will as the true will.²⁹

Another interesting side light of the decision in the case was under what circumstances and how non-experts should be allowed to give their testimony as to the soundness of mind of the testator, stating that the true view was set forth in *Wood v. State*.³⁰ There it is declared that they shall testify as to the facts, acts and declarations of the testator, and then give their opinions based upon these facts. It was also held that the attending physician who treated the alleged testator might be qualified as an expert and thus testify, but, otherwise, he could not testify except as a non-expert. And of course the physician is barred under the principle of privileged communication from testifying to anything that he learned from the patient by virtue of the relationship of patient and physician.

At this point the writer cannot resist the temptation of making brief reference to the nature of one instruction frequently asked judges on the issue of testamentary capacity *vel non*, and which instruction should not be granted with the use of the word "insane" therein. For an instruction

²⁵Jamison v. Jamison, 96 Miss. 288, 57 So. 130 (1909).

²⁶Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919).

²⁷Isom v. Canedy, 128 Miss. 64, 88 So. 485 (1921).

²⁸Miller v. Miller, 96 Miss. 526, 51 So. 210 (1910).

²⁹Smith v. Smith, 185 Miss. 702, 188 So. 305 (1939).

³⁰58 Miss. 741, 742 (1881).

which tends to indicate that the issue for determination is whether alleged testator was insane is misleading, since some juries might have thought him lacking in testamentary capacity and at the same time not insane as that term is ordinarily accepted.³¹

The history of the *Sheehan* case shows its soundness and its importance: First, as responding to the direction of the statute in Mississippi by placing upon the proponent the burden of proof throughout the trial of a will contest. Second, it shows the soundness of the *Sheehan* case as a matter of logic, reason, and philosophy incident to the practices of mankind and incident to the things inherent in the actual process of making a true last will and testament. Further, its history also shows its independence in that it challenged in its reasoning, aside from the Mississippi statute, the majority view at that time as to the incidence of the burden of showing undue influence. Moreover, it shows that it is becoming of increasing importance in that it continues to be cited not only by text book writers but by courts of many jurisdictions in the United States. Increasingly the reasoning of the *Sheehan* case is being approved by jurisdictions outside of Mississippi. Therefore, the case of *Sheehan v. Kearney* must, if the future repeats the past, continue to contribute to the historical development of sound jurisprudence on the question dealing with the burden of proof on the issue of undue influence in will contests.

³¹Smith v. Smith, 185 Miss. 702, 188 So. 305 (1939).

MISSISSIPPI LEGAL HISTORY

LANDS OF THE LIQUIDATING LEVEE BOARD THROUGH LITIGATION AND LEGISLATION *

John William Wade†

One of the objections urged by Henry George against private ownership of land is the fact that the time and talent of many of the greatest men of the world are more or less taken up with the study of the intricacies of the law of real property. The student of law when he first pores over the dry pages of Blackstone, distinguishing the four general classes of estates, then subdividing these classes *ad infinitum*, as he thinks, losing himself in this labyrinth of law, fully appreciates the force of Mr. George's remark. Indeed, able lawyers have concluded that the full comprehension of the English common law of real property, as founded upon the doctrines of the feudal system, is beyond the power of any one man. But while the feudal tenures are the source of the law of real estate of this country, their technicalities have been lopped off by enactments, constitutional and statutory, until at the present day there is but little, if any, trace of them remaining in the American law of real property.

But while it is true that under our modern jurisprudence lands are held "free from the burdens of tenure," yet our lawmakers have created to the lands familiarly known as the lands of the Liquidating Levee Board, titles in some respects more complicated than the tenures of olden times. It is not the purpose of this article to attempt an analysis of these titles, but rather to give a brief history of the causes, conditions, development and final perfection of them.

The historic title of these lands had its beginning in a dual system of taxation, which resulted in a double series of tax titles, standing in some instances in conflict with each other as well as in conflict with all other titles. Tax titles from time immemorial have been even in their simplest forms the terror of land owners. As every one knows, the levying and collecting of a tax upon land are proceedings *in rem*, and if valid convey the original paramount title. The great trouble has been to secure valid proceedings. The common law rule required literal and strict compliance with all the tax proceedings as a requisite for a tax sale to pass title to land. An able writer gives the following description of the common law tax title:

*This article is reprinted with slight changes of form from 9 PUBLICATIONS OF MISS. HIST. SOC. (1906) 273; see editorial *supra*, p. 102.

†Ph.B. (1901), A. M., LL.B. (1902) Univ. of Miss.; Judge, 1st Div. 6th Jud. Dist. of Arkansas, 1917-26; d. 1926.

"The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises from the mere production of the deed, that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposed upon them, and every condition essential to its character, then the deed becomes conclusive evidence of title in the grantee according to its extent and purport."¹

To prove conformity to all these requirements of the law has been found almost impossible, in most instances, thus causing tax titles to fall into great disrepute, so much so that the Superior Court of New Hampshire is said to have declared "that a tax collector's deed was *prima facie* void."² This seems to have been the law in Mississippi originally,³ but before the time that our narrative begins statutes had been enacted in this State,⁴ as well as in many other states, which changed the common law rule, above stated, so as to shift the burden of proof from the purchaser to the former owner, thereby making the tax deed *prima facie* valid instead of *prima facie* void. These statutes have often been questioned, but have been repeatedly upheld.⁵

In view of the general distrust and conceded precariousness of tax titles resulting from sales even when made by a single sovereign, the urgent need for repeated and continued legislation and litigation over the tax titles of the lands of the Liquidating Levee Board will be evident when it is remembered that these lands formerly owed fealty to two or more sovereigns at the same time and often forfeited in payment of same. The great wonder is that these titles have ever been perfected. Be it said to the credit of our courts and legislatures that while continuous bodies might have accomplished the difficult task in shorter time and with less effort, yet it could not have been done more effectively.

The narrative divides itself into three parts, viz: First, the acquisition of titles; second, the fight for supremacy, and third, the perfection of title.

The lands of the Liquidating Levee Board are located in and embrace the greater part of the Yazoo-Mississippi Delta. This fertile region is bounded on the west by the Mississippi River, and on the east by the foothills which approach the river near Memphis, Tennessee, and at Vicksburg, Mississippi, the northern and southern terminal points. The Delta

¹BLACKWELL, TAX TITLES (3rd ed. 1869) 430.

²WASHBURN, REAL PROPERTY (3rd ed. 1868) 225.

³Doe *ex. dem.* Helm v. Insurance Co., 8 Sm. & M. 197 (Miss. 1847).

⁴Miss. Laws 1843, c. 1, § 6.

⁵Ray v. Murdock, 36 Miss. 692 (1859).

is something more than two hundred miles long, with an irregular width probably averaging seventy-five or eighty miles.

At the beginning of the period of the acquisition of titles comes the title of the original patentees from the government. All these lands were acquired by the United States from the Indian tribes of Mississippi, except in a few instances in which the title to small bodies was under treaties with the Indian tribes reserved to individual Indians. Before the year 1850 individual settlers had patented portions of this land direct from the United States, but by far the greater body of it was still at that time in the United States Government. By what is known as "the Swamp and Overflowed Land Act," passed by Congress in September, 1850 (chapter 84), all of these lands remaining unsold by the United States were donated by Congress to the State of Mississippi for the purpose of public improvements. By an act of the Legislature of the State of Mississippi approved March 15, 1852⁶ the Secretary of State was authorized and required to offer for sale by quarter sections to the highest bidder 500,000 acres of land donated to the State of Mississippi by the Congress of the United States (Swamp and Overflowed Land Act) for the purpose of internal improvements at the minimum price of two dollars per acre, in front of the capitol at Jackson, Mississippi, the sale to commence at eleven o'clock A.M., on the third Monday in November, 1852, and to continue from day to day until all of said lands to which the State shall then have title shall be offered for sale. By virtue of this act and its several amendments the State sold and patented to private individuals much of these lands, but by no means all of it, as there was more land to be sold than there were bidders to buy it. By an act of the Legislature of the State of Mississippi, approved March 2, 1854, the Secretary of State was authorized and requested to issue on or before the first day of April, 1854, to the Presidents of the Boards of Police of the counties of DeSoto, Tunica, Coahoma, Bolivar, Washington and Issequena to be used for the purpose of aiding in the completion of levees in their respective counties, seven hundred and twenty thousand acres of land scrip, in quarter sections. This scrip was issued and distributed to the presidents of the county boards of the several counties mentioned, according to the provisions of this act. In some instances private individuals bought this scrip from the boards of police, located claims by virtue of it on certain of these lands, whereupon the state patented the lands so located to them. In this way it is seen that further lands were vested in private settlers. The greater part of the land scrip remained, however, with the county boards undisposed of, and the secretary of these boards, on November 7, 1854, patented the land so left over from the state to himself for the levees of his county.

⁶Miss. Laws 1852, c. 15, 16.

By virtue of an act of the Legislature of the State of Mississippi, approved January 25, 1856,⁷ Christopher I. Field, as Levee Treasurer, sold by warranty deed large tracts of this land to individual purchasers. Probably the largest one of these sales was the sale made to Daniel Low and E. H. R. Lyman, as trustees of the Mississippi Bottom Land Company of New York. This sale, made on November 15, 1856, conveyed title to 120,071 acres of land lying in the counties of Coahoma, Bolivar, Sunflower, Washington, Issaquena, Yazoo, Holmes and Warren.

It was of the greatest importance to the country that the title to these lands should pass from the government. Subjected as they were at that time to frequent inundation, they were of but little value without levees to protect them. To build levees required considerable money, and this money could be best raised from these lands. As long as the title to them was in the government they bore no income. The levees realized first from the sale of the lands and second from an annual tax levied on them. In order to produce this income the State passed the laws above referred to, by virtue of which the greater portion of them passed from the government to private owners, and thus they became revenue-bearing lands. So much for the title of the patentees. Let us turn now to the creation of the levee boards and the building of levees, where we shall soon find a new title to these lands.

A review of legislation in respect to levees enacted prior to the year 1858 disclosed the fact that they had been treated by the legislature as entirely a matter for the counties. The word district, when used in this connection, in early statutes means subdivision of a county, corresponding probably to what at that time was known as the police district, and now known as supervisor's district. The matter was purely a local one, no two counties nor parts of different counties were united into a levee district, and each county was left to create its own districts. In the several counties the same general end was sought, viz.: the protection of the lands from inundation. But different means were frequently employed in the different counties; for example, the system of levee taxation varied. These early levee laws mark the beginning of our present great levee system; and like the beginning of all such enterprises, as well as the beginning of government itself, it was purely local, an experiment on the simplest and smallest scale. But with the levee system it was soon evident to all that the districts must necessarily be made larger so as to include several counties in one district. The lower counties of the Delta were at the mercy of the upper counties, and however much they may have expended to protect their own river front, their efforts were almost useless in case of a

⁷Miss. Laws 1856, c. 87.

crevasse farther up the river. Furthermore, the different methods of levee taxation in the different counties caused lack of harmony. Probably when the work was needed most, there were no funds with which to have it done. There was no central representative body, and the local bodies had no authority without their respective counties. It was soon evident that the county was too small a sovereign, and that if it remained the unit, an authoritative representative body must be created to supervise the several districts.

To meet this demand the legislature in 1858⁸ organized the counties of Tunica, Coahoma, Bolivar, Washington, Issaquena, and parts of DeSoto, Panola, Yazoo, Sunflower and Tallahatchie into one levee district. The local levee authorities of the counties, after June 1, 1859, were to be suspended from further authority to build or repair levees, but they were continued in office for the purpose of liquidation until the expiration of three years, at which time the general board was to assume their debts remaining unpaid.⁹ It was provided, however, that the Boards of Police of Tunica, Coahoma, Washington and Issaquena Counties might in their discretion, levy annually, in addition to the tax provided for the support of the general levee board, a tax not to exceed twenty-five cents per acre, on all lands in their respective counties subject to taxation under this act, which should constitute special local funds to be used by the county authorities for levee purposes as they saw proper.¹⁰ To this extent the county levee boards were continued, but the general levee board soon eliminated and superseded the county levee boards.

The general levee board was incorporated by the Act of 1858¹¹ under the style of "The Levee Commissioners," and was composed of one member from each of the counties of the general levee district. A uniform tax of ten cents an acre per annum was levied in April from 1859 to 1863, inclusive, on each and every acre of land in the district, except lands held by the State, and school lands, and Chickasaw school lands, while held in trust by the State. Lands in DeSoto and Panola Counties outside of the overflowed district, were also excepted from this tax. The sheriffs of Tunica, Coahoma, Bolivar, Washington and Issaquena Counties were required to pay the taxes collected under this act for the first three years over to the persons then by law authorized to receive the same in said counties respectively, while the sheriffs of the other counties of the district were required to pay this tax collected by them over to the treasurer of the Levee Commissioners. During these three years the levee taxes in these

⁸Miss. Laws 1858, c. 1.

⁹*Id.* c. 1, §16.

¹⁰*Id.* c. 1, §21.

¹¹*Id.* c. 1.

five counties were to be applied to the liquidation of the debts theretofore incurred by the levee authorities of such counties respectively, under the local boards of the counties. After the lapse of three years this tax from all the counties was to be paid by the sheriffs of the counties direct to the Treasurer of the Levee Commissioners, in whose hands it was to become a consolidated fund.¹² The taxes levied were declared to be a lien on the lands, with power in the sheriffs to sell the lands for non-payment of such taxes, and with power in the Treasurer of the Levee Commissioners to buy them in for the said Levee Commissioners. These in brief are the provisions for raising income to carry on the building and repairing of levees by the Levee Commissioners. But better levees were an immediate necessity, and funds from taxation would come into their hands at too slow a rate. To obviate this delay the Levee Commissioners were authorized to issue levee scrip, payable not later than January 1, 1863, to an amount not to exceed a half million dollars, bearing a maximum interest of eight per cent. The consolidated fund, from taxes and incomes from the sale of those lands, which were still the property of the levee board, as well as such lands as were forfeited to the Levee Commissioners for the non-payment of levee taxes was to be used for the redemption of this indebtedness.¹³

The Board of Levee Commissioners was vested by the statute creating it with power to sell the land upon which the levee tax was due and unpaid, and the treasurer was authorized to buy in all such lands in case there was no one bidding the amount of the taxes. Considerable land was forfeited to the board for non-payment of taxes, in 1860 to Isaac S. Robinson as treasurer, and in 1861 to Christopher I. Field as treasurer. These forfeited lands were held by the board subject to redemption. Private individuals often bought at these sales, acquiring tax titles. Thus it will be seen that before the War Between the States there had begun this double system of tax titles, but the person to whom a tax deed was made in satisfaction of taxes due the State had the better title, as no lands subject to a levee tax was at that time exempt from state and county taxes. Only a small proportion of the land was forfeited in those days of prosperity, and in most instances of forfeiture the lands were redeemed during the period of limitation, so there seems to have been but little if any conflict between holders of adverse titles.

Under the management of the Levee Commissioners the work of building levees took on new life. The Honorable James L. Alcorn, afterwards governor of the State, was president of the commission. His re-

¹²*Id.* c. 1, § 2.

¹³*Id.* c. 1, § 14.

ports to the legislature are full of interest, and throw a flood of light on the levee legislation of the period from 1858 to 1869.¹⁴ As a result of these reports the statute approved February 10, 1860,¹⁵ extended the levee tax until April 1, 1865, and authorized the Levee Commissioners to substitute their script for outstanding levee scrip of the several counties. This act further provided for the collection annually of the State and county taxes due on lands held by the Levee Commissioners.

By the year 1860 there had been developed an efficient system of levee construction. A considerable amount of levee had been built and much more was in process of construction. In a short time the Delta would have been protected from the much dreaded inundations of the "Father of Waters," and the fertile country placed in position to develop its resources. But in 1861 the war began. It lasted four years and devastated the country, leaving the levee system in much worse condition than it was in at its beginning. The revenues of the Levee Commissioners were soon cut off. A number of suspension statutes were enacted by the State Legislature. The first of these was the act of August 6, 1861,¹⁶ which suspended the collection of the ten cent tax imposed by the statutes of 1858 and 1860 until the first Monday in April (the beginning of the levee fiscal year) next after the termination of the war, and provided that such taxes, after the war, should be collected for the same number of years they had to run when suspended, those imposed by the Act of 1858 to be collected before those imposed by the Act of 1860. The Act of December 20, 1861,¹⁷ suspended collection of all State and county taxes for the current year upon any lands owned by the Levee Commissioners or the treasurers of any of the county levee boards until the meeting of the next regular session of the legislature, unless previously sold or redeemed. The Act of January 25, 1862,¹⁸ imposed interest upon the postponed levee taxes, to be paid when the taxes should be collected. By the Act of November 25, 1863,¹⁹ all acts or parts of acts authorizing the boards of police to collect a levee tax were suspended without prejudice to the claims of any one until such time as the legislature may regard proper that the collection of the levee taxes may be resumed. After the war the latter tax was postponed indefinitely, the legislature never finding a "proper time" to revive it. The taxes provided for by the Act of 1858, to be collected for the years 1862 and 1863, and those provided by the amendatory Act of 1860, collectible for the years

¹⁴Miss. Sen. J. (1859) app. 366, 393, 450.

¹⁵Miss. Laws 1859-60, c. 340.

¹⁶Miss. Laws (Called Sess. July, 1861) c. 49.

¹⁷Miss. Laws 1861-62, c. 136.

¹⁸Miss. Laws 1861-62, c. 186.

¹⁹Miss. Laws 1863, c. 20.

1864 and 1865, were by the suspension acts revived April 1, 1865, only to be further suspended until 1868 and 1871.²⁰

The general levee board of 1858, known as the Levee Commissioners, went out of existence with its suspension made at the outbreak of the war, the legislature having suspended it during the war and failing to revive it after the end of the war.

All the foregoing is in its nature preliminary; we come now to the Liquidating Levee Board proper. This board was created by an act passed February 1, 1867.²¹ It was never intended to build or repair levees, but became a law for the express purpose of liquidating the outstanding liabilities of the general levee board, or Levee Commissioners, incurred by authority of the Act of December 2, 1858, and acts amendatory thereto. The war coming on in 1861, the levee board found that its work in building levees was suddenly interrupted, and that it was heavily in debt. Its debts, direct and indirect, under the Act of 1858, and amendments, the interest on which was about fifty per cent of their face value, amounted, in 1867, to \$1,500,000. These debts were long past due and were a heavy charge upon the lands. In fact, much of the land, unprotected by levees and exposed to constant and continuous overflows, was not worth the charge then upon it. Property was devastated by the war and money was extremely scarce. Without some legislation these old debts stood a poor show of ever being paid. To remedy these conditions and to provide a safer way for the payment of this indebtedness the Act of February 13, 1867, was passed.

This act provided that the governor should appoint a board of three commissioners, to be styled the Board of Commissioners to liquidate outstanding liabilities. The first meeting of this board was to be held on the first Monday in March, 1867, when they were to organize by electing a president, secretary and treasurer. They were required to pass at the first meeting an order requiring all persons who had claims alleged to be due, the payment of which was provided for by the act, to present them to the secretary of the board on or before June 1, 1867, to have them registered; and all claims not so presented were to be excluded from the benefits of the act. The secretary was to register, in books kept for the purpose, each claim presented, with the name of the person presenting it, and the person claiming to be its owner, and to endorse on it the time at which presented. The board was required to examine all claims so registered by the secretary, and to mark on them their approval or disapproval. Only the own-

²⁰Griffing v. Mills, 40 Miss. 611 (1866).

²¹Miss. Laws 1866-67, c. 173.

ers of claims so approved by the board were to be entitled to the benefits of the act.

In order that a bondholder might claim the privileges of this statute some concessions had to be made on his part. He was required to surrender his claim to the board to be cancelled, to remit all accrued interest prior to June 1, 1867, and to accept in lieu thereof the bonds of the Liquidating Levee Board for the face value of his claim, less interest. The remission of the accrued interest saved the board several hundred thousand dollars. The bonds of the Liquidating Levee Board, issued in payment of these debts of the old levee boards, were payable in five equal annual installments, with interest at the rate of five per cent per annum from June 1, 1867, until paid. The bondholder was required on receiving the bonds to supply the stamp required by the United States revenue laws. It may be suggested that these conditions required a surrender of about one-third or one-half of the amount due, and to that extent was confiscation; but it must be remembered that it was optional with the bondholder whether he would take advantage of the statute. In case he saw fit not to accept its terms he was left to his original remedy, just as if the statute was not in force. No part of the indebtedness was by the terms of the act repudiated, but the bondholders only given an opportunity to release their accrued interest in consideration of better securing their principal. The creditors of the general levee board, with few exceptions, accepted the terms of the statute, surrendered their evidences of debt, and took the bonds of the Liquidating Levee Board in lieu thereof. The presentation of these bonds was suitably provided for, and the treasurer of the board, who received the money collected, was with it to pay them, as well as salaries and expenses. Two sources of revenue were provided. First, a uniform tax of five cents an acre in some counties of the district, and of three cents an acre in the others, was levied and made payable on the first of May, each year. This tax, it was stipulated, should continue until a sufficient sum was collected with which to pay off all the debts and liabilities contracted or assumed, and all the scrip or evidences of debt issued by the Board of Levee Commissioners, organized under the act approved December 2, 1858, and it was declared to be a tax *in rem* upon the lands. In the second place, revenue was to be derived from the sale of lands. The statute authorized the board to receive and sell all the property of the Levee Commissioners under the Act of 1858. The tax on land to be levied for this board as authorized by the act, if not paid annually by May 1st, would be in default, and would subject the land for sale for these taxes, whether the owner had personalty or not. From the sheriffs of the counties within the district, special bonds were required, and the proceedings of sale, forfeiture, and redemption were to be the same as those prescribed by the Act of 1858. Lands forfeited to the board for taxes and not redeemed could also be sold

by the board. All proceeds from all sources were to be applied toward liquidating the bonds, and the surplus funds were to be used to buy outstanding bonds. After the payment of all the bonds, the money, lands and other property belonging to the board were to be applied to such uses as the legislature might direct.

After all demands not presented had become barred by the terms of the statute, on May 13, 1871,²² the legislature extended the time for presenting claims until the second Monday in November, 1871, provided that the bonds issued for those then presented should be designated "new series"; and continued the tax, as well for the payment of the new series as the old. All unpaid bonds, whether due or not, were made receivable for levee taxes due or to become due under said acts; and the governor was authorized to appoint one commissioner who succeeded to the powers, rights, and privileges of the Liquidating Levee Board, and was substituted in their stead.

Such in brief is the statute creating the Liquidating Levee Board, probably the most legislated and litigated statute that Mississippi has ever known. It furnishes the foundation of almost every land title in the Yazoo-Mississippi Delta, and here it is well to turn aside for the present from further discussion of statutes for a brief notice of the land forfeitures to this memorable board.

But few land owners made any attempt to pay the liquidating levee tax, and the number of bidders at tax sales was even smaller. The second Monday in May each year witnessed only formal forfeitures to the Liquidating Levee Board. In some counties no sales were made for the first year or two. In Sunflower County, for example, the lands were sold in May, 1870, for the delinquent liquidating levee taxes for the years 1867, 1868, and 1869, more than four hundred sales being made at this time, conveying more than nine-tenths of the taxable lands of the county to the Liquidating Levee Board. Only about a dozen sales were made a year later for the liquidating levee taxes for the year 1870, and as there was no more land in the county to be sold there were no more sales for this tax later than the year 1871. Printed deed records were provided for each county, and by filling into these blank records a description of the land conveyed, some names and dates, the evidence is perpetuated of the almost universal confiscation to the Liquidating Levee Board of the lands of the Delta, and upon this deed record depends almost all of its present land titles.

Although it is not the purpose of this article to give a history of the several levee boards, it will be necessary in tracing the title of the lands of

²²Miss. Laws 1871, c. 2.

the Liquidating Levee Board to notice somewhat these other boards, because of conflicting titles between them and the Liquidating Levee Board. The first to be noticed in this connection is the levee board of Bolivar, Washington and Issequena Counties, commonly called the "Ten Cent Levee Board." It has already been seen that the general levee board of 1858 (Board of Levee Commissioners) was suspended during the war, and that this board was never reorganized, but passed out of existence with this suspension. Levees for counties bordering on the Mississippi River were an absolute necessity, so in the absence of a general levee board, the legislature by an act passed November 27, 1865,²³ incorporated this local board, known as the Ten Cent Levee Board. This act authorized a uniform tax of ten cents per acre upon all the lands in said counties (with certain exceptions) payable on or before March 1st, annually, from 1867 to 1879, inclusive. This tax was made a lien on said lands, and in case of failure to pay the same, it was provided that the sheriff should, on the first Monday in April each year, sell the land in default. If the amount due on any tract should not be bid, then the same should be struck off and a deed executed to the treasurer of this levee board. In accordance with the provisions of this act, large tracts of land in these counties were soon forfeited to the treasurer of the Ten Cent Levee Board in payment of default taxes due said levee board. These same lands were frequently forfeited for non-payment of taxes, either to the State or to the Liquidating Levee Board, or to both. One or more of these forfeitures often conveyed no title, as all subsequent forfeitures either to the State or to the Liquidating Levee Board, after a valid forfeiture to the Ten Cent Levee Board, and prior to a redemption or purchase from said board, were void and conveyed no title.²⁴ By Act of April 11, 1876, the title of the Ten Cent Levee Board was transferred to the State.²⁵

But the Ten Cent Levee Board was authorized to protect only a part of the river front, and concentrated all its efforts in levee construction for its district only, so there remained a great portion of the river front still unprotected from overflows. To meet this demand the legislature, by an act approved March 17, 1871,²⁶ incorporated what is known as the "Levee Board of the State of Mississippi, District Number One," embracing the counties of Tunica, Coahoma, Tallahatchie, Panola and DeSoto. Levee District Number One was supplementary to the Ten Cent Levee Board, the two embracing different territory, and together covering the entire Delta front. The statute creating Levee District Number One levied a tax of

²³Miss. Laws 1872, c. 53.

²⁴*Louisville, N. O. & F. Ry. v. Buford*, 73 Miss. 494, 19 So. 584 (1895).

²⁵Miss. Laws 1876, c. 105; *Shotwell v. Louisville, N. O. & F. Ry.*, 69 Miss. 541, 11 So. 455 (1891).

²⁶Miss. Laws 1871, c. 1.

two per cent per annum on the value of every acre of land in said district for the period of twelve years.²⁷ Provisions were also made for the collection of this tax, including sale and forfeiture in cases of default. Again, the taxes were often not paid, and for want of purchasers at tax sales forfeited to this board for taxes. These forfeited lands were held by the board chargeable with State and county taxes, the collection alone of which was suspended during the board's holding the land, and also chargeable with liquidating levee taxes, accrued and to accrue, which had to be paid by the Levee Board of District Number One, there being no suspension of collection.²⁸

Add to the foregoing list of conflicting titles sales made by tax collectors for non-payment of State and county taxes to purchasers and forfeitures to the State for default taxes, and the list of land titles of the Delta is about complete.

The Liquidating Levee Board enjoyed certain privileges in the way of taxation over all other levee boards. Its lands were exempt from all taxes—State, county and levee.²⁹ The lands of the other levee boards were obliged to pay all State and county taxes, and also the tax of the Liquidating Levee Board, while lands forfeited to the State or to the Liquidating Levee Board were exempt from all taxes until they were redeemed and again became revenue bearing. Most of the land soon sank into one of these non-taxable classes. While in theory it was impossible for land to belong to both of these non-taxable classes at the same time, yet so complicated was the system of tax forfeitures that the State and the Liquidating Levee Board often laid claim to the same land at the same time, and no one knew which had the better title.

It may be asked, Why did not the owners of these lands pay their taxes, and thus prevent these repeated forfeitures? But it must be remembered that the war left the country poverty stricken. Besides, the extravagant rule of ignorant negroes and ignominious carpetbaggers during the period of reconstruction would have bankrupted the richest people on earth. Little effort was made by those in authority to bring about better industrial conditions, but rather they held the State up with high handed extravagance and misrule to bleed her already thin and emaciated frame. The rate of taxation was so high till lands became more of a burden than a benefit. Often land owners could not have sold their lands for enough money to pay one year's taxes. Nearly all the lands of the State were forfeited, or rather were confiscated, for taxes. When there was no longer

²⁷*Id.* c. 1, § 8.

²⁸*Woodruff v. State* 77 Miss. 68, 25 So. 483 (1899).

²⁹Miss. Laws 1866-67, c. 173, § 13.

any revenue-bearing property in the State, our Northern exploiters left us, escaping in many instances under cover of night with every valuable thing they could lay hands on and carry with them. The wonder is not that the lands were forfeited, but that they were so quickly redeemed.

The foregoing briefly disposes of the several sources of titles, and we come now to the contest for supremacy, the battle of titles. While it would probably be incorrect to say that all other land titles made common cause and fought in the same army against the title of the Liquidating Levee Board, yet each title in its turn battled against the title of the Liquidating Levee Board, and as this title must bear the brunt of the fight, it is well here to examine its strong and weak points.

The legislature probably did not realize the full force of the enactment creating the Liquidating Levee Board. We have already seen that this statute was a proposition made on the part of the State to the bondholders of the General Board of Levee Commissioners granting to them certain privileges upon the concession on the part of the bondholders of certain of their rights, and that the bondholders generally accepted that proposition. Once accepted it became a contract completely executed, and the courts have held invariably that all subsequent legislation in material derogation of its terms enacted during the life of the contract was unconstitutional and void, being in direct conflict with the constitutional provision forbidding the impairment of the obligation of contracts. This was the Gibraltar of the title of the Liquidating Levee Board, the strength of which will be seen more fully as we proceed.

What were the weak points in the title of the Liquidating Levee Board? What are the weak points in any tax title? The failure of the officers to make substantial compliance with the law. Sales for liquidating levee taxes were not made upon any assessment of the lands. The tax was an acreage tax, recurring annually, and imposed by a general law. Neither the assessor nor the county board had anything to do with this tax, so there is nothing to be feared from irregularities in the assessment, equalization or certification of this tax. The only objections that could ever be made to these tax sales, where the land was liable for the tax, must be based upon one or more of the following grounds: (1) That the tax collector had not given bond prescribed by the Acts of 1858 and 1861,³⁰ as collector of these taxes; (2) that the lands were not sold on the proper day; (3) that they were not sold at the proper place; (4) that they were not sold in the proper legal subdivisions or multiples thereof; (5) that they were not sold annually for the taxes of single years; (6) that the officers failed to make proper deeds conveying the land to the Liquidating Levee

³⁰Miss. Laws 1858, c. 1; Miss. Laws 1867, c. 173.

Board; and (7) that, as many of these original deeds have been lost, the clerk failed to properly file and record these deeds. Probably there was not one sale free from all the seven objections above enumerated, and against the great majority of the sales the most if not all these objections would be well taken.

The first battle waged against the title of the Liquidating Levee Board was waged by those claiming under the original government patentees, or in other words, those from whom the land was forfeited. Gen. James Z. George led the first charge. Certain of his lands had been sold in 1870 by J. E. Johnson, tax collector of Sunflower County, to the Liquidating Levee Board for default taxes. On June 21, 1871, General George filed his bill in chancery court against W. H. Vasser, Liquidating Levee Commissioner, praying that the title of the Liquidating Levee Board acquired under the tax sale of 1870 be canceled, and from a decree in his favor, Vasser, Commissioner, appealed. The decree in the lower court was sustained. The Supreme Court held in this case: (1) That the lands delinquent for liquidating levee taxes were required to be sold at a designated day in the year, and on no other; (2) and at the place appointed, and no other; (3) that the lands sold for taxes should first be offered in lots of forty acres, and (4) that there was no authority in the tax collector to sell unless he had given bond as levee tax collector.³¹ In other words, the title of the Liquidating Levee Board was completely routed, and its fatal weaknesses shown to the public.

This decision seems to have lulled the taxpayers into peaceful repose. The tax collector had been taking for taxes all that the taxpayers could make above a bare living. Their land had gone to the Liquidating Levee Board and was exempt from all taxes. They still occupied these lands, and as the tax title was void, could recover their former title whenever they so desired; but why hasten to recover it and pay taxes again? They had found, as they thought, a real benefit in the "dead hand" of the Liquidating Levee Board.

But the taxpayer's repose proved fatal to his title. Further litigation was in the very nature of things unavoidable, and the holders of the title of the Liquidating Levee Board sprang a new weapon of defense. By an act of the legislature approved February 10, 1860,³² it was, among other things, declared "that all sales of lands hereafter made for non-payment of taxes due under any law of this State, shall be valid to all intents and purposes, said land subject to redemption as provided by law, and that no such sale shall be impeached or questioned in any manner or for any

³¹Vasser v. George, 47 Miss. 713 (1873).

³²Miss. Laws 1859-60, c. 154.

cause, saving fraud or mistake in the assessment or sale of same, and no suit to set aside any title acquired under any such sale hereafter to be made, shall be brought unless within five years from the date of sale." The Supreme Court of the State in construing this act at different times has held: (1) That it is a legitimate exercise of legislative power and discretion;³³ (2) that it applied to tax sales for levee taxes as well as to sales under the general revenue laws of the State;³⁴ (3) that the failure of the officer to give bond as levee tax collector was cured by operation of this law, after a lapse of five years from the day of sale;³⁵ (4) that the sale was not made at the door of the courthouse was likewise cured;³⁶ (5) also, that the land was not offered in the smallest legal subdivisions, but was sold as one tract, was cured;³⁷ and (6) generally, that the lapse of time under the operation of this statute cured all defects in tax proceedings, except those controlled by constitutional provision.³⁸ To quote the language of the court: "The statute existed as part of the revenue laws of the State, and its declaration was an admonition to those owning property subject to taxation, and an assurance to those who should become purchasers at tax sales, after the lapse of a certain time from the sale for taxes, all those requirements imposed by the legislature should be read as directory and not as mandatory laws, and that no failure to conform thereto should be held to invalidate the title of the purchaser."³⁹ Again, "the provision as to future sales was intended to be, and was, an irrevocable and irrepeachable stipulation that after a lapse of the time named, no assailment of the title should be made. It was, and was intended to be, a part of the contract into which the purchased would enter; an inherent, continuing element of right, secured, running with the land, and a perpetual security of the title."⁴⁰

Thus was settled this embarrassing condition. All the defects as pointed out herein, in the title of the Liquidating Levee Board, were matters that rested within the legislative will. Although a failure in any respect to comply with the directions of the law might have avoided the tax sales, if seasonably assailed, the lapse of five years from the date of sale, under the decisions already referred to, rendered the title of purchasers at such tax sales free from attack.

Thus it appears that so far as the original patentees and their privies, the Liquidating Levee Board title was paramount. However, some years

³³*Beleher v. Mhoon*, 47 Miss. 613 (1873).

³⁴*Nevin v. Bailey*, 62 Miss. 433 (1884); *Metcalf v. Perry*, 66 Miss. 68, 5 So. 232 (1888); *Sigman v. Lundy*, 66 Miss. 522, 6 So. 245 (1889).

³⁵*Carlisle v. Yoder*, 69 Miss. 384, 12 So. 255 (1891).

³⁶*Sigman v. Lundy*, 66 Miss. 522, 6 So. 245 (1889).

³⁷*Ibid.*

³⁸*Nevin v. Bailey*, 62 Miss. 433 (1884); *Sigman v. Lundy*, 66 Miss. 522, 6 So. 245 (1889).

³⁹*Nevin v. Bailey*, 62 Miss. 433 (1884).

⁴⁰*Sigman v. Lundy*, 66 Miss. 522, 6 So. 245 (1889).

later, this board met its biggest contest, this time in the United States Court. William G. Ford and Louis P. Levy, two lawyers of New York City, filed, on February 27, 1889, a bill in equity in the Circuit Court of the United States for the Southern District of Mississippi claiming title to more than two hundred large tracts of land situated in nine different counties, and praying that their claim be quieted by cancelling the adverse claim of the defendants, in whom was vested the Liquidating Levee Board title. The complainants were represented by three of Mississippi's ablest lawyers, A. H. Whitfield, Edward Mayes and W. V. Sullivan to whom was given as a fee a deed to one-fifth interest in the following lands: in Leflore County, 9,320 acres; in Tallahatchie County, 15,760 acres; in Quitman County, 37,700 acres; in Sharkey County, 36,720 acres; in Bolivar County, 38,840 acres; in Sunflower County, 30,600 acres; in Coahoma County, 13,520 acres; in Washington County, 16,000 acres; in Yazoo County, 18,440 acres; in Issaquena County, 16,360 acres; amounting in all to 235,660 acres. Complainants claimed not only through patents from the United States and from the State of Mississippi, but claimed also that their lands were exempt from taxation at the time that it was sold for taxes, it then being the property of the Selma, Marion & Memphis Railroad Company. This company, originally known as the Memphis, Holly Springs and Mobile Railroad Company, was chartered by an act of the legislature of the State, approved November 23, 1859.⁴¹ Section 19 of this act exempted all the property of said company from taxation until said railroad company should be completed. The war interfered with the construction of the railroad. On February 20, 1867,⁴² a statute was passed reviving the corporation. A further statute was passed July 21, 1870,⁴³ which provided "that said Selma, Marion & Memphis Railroad Company is hereby authorized to receive, in the way of subscription to the capital stock of said company, lands lying anywhere within the limits of the State of Mississippi." Under the authority of this statute these lands were conveyed by the government patentees or their privies to the railroad company, which title had passed to the complainants. It was contended by complainants that these lands were owned by the railroad company and exempt from taxation by the Liquidating Levee Board, so that as there were no taxes due said board the lands could not forfeit to it for taxes. Complainants had still a further title. On March 16, 1872, the legislature passed an act to facilitate the construction of the railroad, which act provides "that all lands which have heretofore been forfeited to the State of Mississippi for taxes due and unpaid thereon and which had been sold to said Selma, Marion & Memphis Railroad Company by the original owners of the same, shall be sold to

⁴¹Miss. Laws 1859, c. 14.

⁴²Miss. Laws 1867, c. 464.

⁴³Miss. Laws 1870, c. 220.

said railroad company by the Auditor of Public Accounts at two cents per acre," provided that upon any such lands forfeited to either of the levee boards of the State the levee taxes should be paid.⁴⁴ These lands were conveyed to the railroad company by the auditor under the authority of this statute by deed, which recited that the land had been "sold to the State of Mississippi for taxes due the said State, and that the company had paid into the State treasury two cents per acre in full payment of all State and county taxes due thereon to the present date." No reference was made in these deeds to the levee taxes; no recital of any payment of them, or of any adjustment with the levee commissioners. Complainants contended that the deeds were themselves evidence of a prior payment and discharge of the levee taxes, on the theory that such payment was a prerequisite to the conveyance by the auditor. The Federal Circuit Court rendered a decree dismissing complainant's bill,⁴⁵ and complainants appealed to the Supreme Court of the United States. This court held that the auditor's deed was no evidence of payment of levee taxes; and disposed of the contention that the lands were exempt from taxation by affirming the decision of the Mississippi Supreme Court, (1) that the construction and repair of levees are local improvements, and (2) that exemptions from taxation does not release property from liability from assessments for local improvements.⁴⁶ The decree of the circuit court was affirmed.⁴⁷

Having seen the complete triumph of the Liquidating Levee Board title over the title of the original owners even in the most favorable circumstances to them, we now turn to the conflict between the title of the Liquidating Levee Board on the one hand and the title of the Ten Cent Levee Board or Levee District Number One, on the other hand. As the lands in the district of the two last mentioned boards were subject to the taxes of the Liquidating Levee Board, there was but little, if any, occasion under the laws then existing, for this conflict. Naturally much of these lands forfeited to the Liquidating Levee Board, and as they then bore no revenue the levee boards were exceedingly anxious that some way be devised by which these lands could be subjected to taxation by them. The Ten Cent Levee Board appealed to the legislature for relief, and on April 5, 1872, was passed a special act.⁴⁸ The preamble recites that the lands claimed to be held and owned by the commissioners of this, the Ten Cent Levee Board, are beclouded by claims thereto by the State and the Liquidating Levee Board, and that it is important that the title held by the Ten

⁴⁴Miss. Laws 1872, c. 35, §3.

⁴⁵*Ford v. Delta & Pine Land Co.*, 43 Fed. 181 (S. D. Miss. 1890).

⁴⁶*Daily v. Swope*, 47 Miss. 367 (1872); *Vasser v. George*, 47 Miss. 713 (1873).

⁴⁷*Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. 230 (1897).

⁴⁸Miss. Laws 1872, c. 53.

Cent Levee Board should be quieted, so that the lands may be made available in the payment of the debts contracted by this board for levee purposes. But the enactment extends the remedy beyond the recital of the preamble, so as to include all persons, natural and artificial, who have claim to or "interest in the lands." This universal remedy as provided by this act was the filing in the chancery court by the commissioners of the Ten Cent Levee Board a petition "against all persons claiming or having any interest, either legal or equitable, in and to said lands," praying that said lands be sold for the payment of all taxes in arrears thereon, and in case no bid for any tract was sufficient to pay all taxes on said tract, it was to be knocked off to the circuit clerk of the county to be held for the State until a sufficient amount was offered for it to pay all taxes, when it was to be sold. It was the intention of the act to confirm the title through the chancery court, providing for publication, trial, and sale. The act provided further that the State, or any person or corporation interested therein, should not be made defendants by name, designation or description. On October 22, 1872, in pursuance of this statute this board filed a bill in chancery court of Bolivar County against "all persons having or claiming any interest, either legal or equitable, in and to the lands herein described," as defendants, without naming any individual. On January 24, 1873, a final decree was entered reciting that no cause had been shown why the lands should not be sold for the amount of the taxes stated, and much land in the county was thereby ordered to be sold by a commissioner on the first day of the next regular term of the court. From this decree G. D. Brown, who claimed a portion of the land sold, appealed. The special statute under which this suit was brought was declared, on this appeal, unconstitutional; Judge Simrall assigning seven instances wherein it is in contravention of the constitution, amounting in the main to a declaration that the special statute was an attempt to deprive persons of their property "without due process of law."⁴⁹ Thus perished an attempt on the part of the Ten Cent Levee Board to release and take from the Liquidating Levee Board, without consideration, practically all of its lands in three of the largest counties of the district.

The conflict between the Liquidating Levee Board and Levee District Number One came to the courts of last resort, both State and Federal. A bill was filed in the Chancery Court of Coahoma County, September 15, 1890, by one Shotwell and others against the Louisville, New Orleans & Texas Railway Company, and those claiming under said company, involving the title to a large tract of land in said county. Complainants were original owners of the lands in controversy and also claimed as vendees of Levee District Number One. Defendants claimed title through the Liqui-

⁴⁹Brown v. Board of Levee Commissioners, 50 Miss. 468 (1874).

dating Levee Board and the State. The chancellor found as a matter of fact that the liquidating levee taxes had been paid on these lands, or that redemptions had been made within the time required by law, and because of this finding the title of the Liquidating Levee Board is not further adjudicated in this case.⁵⁰ Some few years prior to the foregoing suit Amos Woodruff, trustee, the German Bank of Memphis, Tennessee, and others, as owners and holders of a large number of bonds, amounting to the principal sum of \$350,000, issued by the Levee Board of District Number One by virtue of its charter, filed suit in the chancery court of Hinds County against the Auditor of Public Accounts and the State Treasurer, as trustees, who by virtue of the Act of 1876⁵¹ last administered the trust funds of said Levee District Number One, and the Louisville, New Orleans & Texas Railway Company, the Delta and Pine Land Company, and Swan and Burroughs, all of said defendants being owners of large bodies of lands claimed both by the Liquidating Levee Board and Levee Board District Number One, to enforce a trust and lien on certain lands in said Levee District Number One. The defendants demurred to the bill, among other reasons assigned, upon the ground that the act of the levee board in making the bonds payable "in gold coin" was *ultra vires*, and the bond therefore invalid. The chancellor sustained the demurrer solely on the last mentioned ground, and the bill was thereupon dismissed. Complainants appealed, and the Supreme Court of the State affirmed the decree of the chancellor,⁵² whereupon an appeal was taken to the Supreme Court of the United States, where the decision of the State courts was reversed, the court holding that the levee bonds in litigation were not null and void because of the recital therein of the indebtedness to be "in gold coin."⁵³ In the Supreme Court of Mississippi, where the cause had been remanded by the United States Supreme Court for decision on the other grounds of demurrer to the bill not considered by either of said Supreme Courts, it was held that the right to have collected the taxes of Levee District Number One, due said levee district after the period of redemption of lands forfeited to the State or to the Liquidating Levee Board had expired, is the full extent of the rights and interests that the holders of the bonds of said Levee District Number One had in the lands in controversy. To quote the language of the court:

" . . . sales of land embraced in levee district No. 1, legally made to the liquidating levee board for liquidating levee taxes . . . conveyed valid title to the liquidating levee board; and while held

⁵⁰Shotwell v. L., N. O. & F. Ry., 69 Miss. 541, 11 So. 455 (1891).

⁵¹Miss. Laws 1876, c. 58.

⁵²Woodruff v. State, 66 Miss. 298, 6 So. 235 (1889).

⁵³Woodruff v. State, 162 U. S. 291, 40 L. ed. 973 (1896).

by the liquidating levee board, said lands were not subject to any tax . . . and could not be sold therefor."⁵⁴

Thus triumphed the title of the Liquidating Levee Board over another adversary.

There was some further litigation over the conflicting titles of the levee boards, more in the nature of collateral attacks, but as these are of minor importance, we pass on to the greater conflict between the Liquidating Levee Board and the State.

The legal tax sale that was made first in point of time, as between the State and Liquidating Levee Board, conveyed title. Frequently forfeitures were made to both the State and this board, yet it was never difficult to show which sale was made first and so to ascertain which sale conveyed title. The Act of 1860,⁵⁵ which made a tax title unassailable after five years, does not cure a levee tax sale which was void because the land being held by the State was not taxable, so not subject to sale for taxes.⁵⁶ Efforts were sometimes made to prove that a first sale made to one or the other was illegal, and by so doing the title was established in the one for whom the second sale was made. A great number of tax sales were made during the war, and the State laid claim to large bodies of land which forfeited to the State during the war. When this title in later years was attacked it was declared void, the Supreme Court holding that "the imposition by the Legislature of the war taxes of 1861, in aid of the rebellion, being void, a sale of land thereunder was void, and could not be validated by subsequent legislation."⁵⁷

But the State did not undertake to fight the Liquidating Levee Board on common ground. The legislature prided itself that it was able to manufacture new weapons of warfare, and it is with these new weapons that we are primarily concerned here. In enacting new laws applicable to the Liquidating Levee Board (its charter has been amended by the legislature no less than twenty times) it must not be imagined that the legislature was actuated by animosity, or any other sinister motive; to relieve the taxpayers of their heavy burdens by placing all lands in the revenue-producing class was the benevolent motive prompting the legislature to act.

Tax titles had become so precarious, purchasers so often acquiring no title at tax sales, and losing the purchase money actually paid, until people

⁵⁴Woodruff v. State, 77 Miss. 68, 111, 25 So. 483, 487 (1899).

⁵⁵Miss. Laws 1859-60, c. 154.

⁵⁶Metcalfe v. Perry, 66 Miss. 68, 5 So. 232 (1888); Ricks v. Baskett, 68 Miss. 250, 8 So. 514 (1890).

⁵⁷Bookout v. Andrews, 25 So. 865 (Miss. 1899); Dogan v. Griffin, 51 Miss. 782 (1875); Shattuck v. Daniel, 52 Miss. 834 (1875); Boyle v. Manion, 22 So. 947 (Miss. 1898).

had about quit bidding at tax sales, thus virtually making these sales merely a formal forfeiture to the sovereign to whom the tax was due. To remedy this condition of affairs the legislature enacted a general law⁵⁸ guaranteeing to purchasers at tax sales protection from the State and county. By this scheme such purchasers should in every instance acquire either a good title to the land sold, or in default thereof should receive back their money. This law was upheld by the Supreme Court, their decision being as broad as the statute they construe. "The intention evident was that no conceivable case should arise in which the purchaser should lose both the land and his money."⁵⁹ This statute, however, did not apply to the Liquidating Levee Board. It marks the beginning of legislative relief from taxation in this period of the State of Mississippi.

We come next to consider what is known as the Abatement Act. This statute, passed March 1, 1875, provided that all taxes for years preceding the year 1874 be abated, that is, that all unpaid taxes for these years, which were at that time delinquent, be abolished. This law was intended to act as a cancellation of all indebtedness due the State and the three levee boards for taxes for these years. Large bodies of land were held by the State and by the levee boards which could not be sold nor taxed. These lands were in a "dead hand," so to speak. The State had concluded that the best policy for it to pursue was to unfetter these lands by getting them into the hands of private owners, and thus throwing them back into the class of revenue-producing property. Justice Cooper sums up the reasons for the enactment of this law, and the conditions intended that it should remedy, as follows:

"On the first of March, 1875, the State was, or claimed to be, the owner of an immense quantity of lands, which had been sold to it for taxes of preceding years. These lands were, as the property of the State, exempt from taxation, and a general distrust as to the validity of the sales under which they had been acquired deterred persons from purchasing them from the State. A considerable portion of them had been purchased by the State prior to the year 1861, and in the destruction of the records caused by the war all evidence of title as to a large portion of them had been lost. Others of them had been acquired under tax sales made during the war, and the taxes for which they had been sold were composed in part of levies for the support of the armies of the Confederate States. Such sales had been declared void by the courts. The proceedings under which by far the greater part of them had been sold were invalid, because of irregularities in the assessment and sales. The owners of these lands, finding them assessed to the State, and thus freed from taxation, and knowing

⁵⁸MISS. REV. CODE (1871) c. 22, art. 11.

⁵⁹Cogburn v. Hunt, 56 Miss. 718 (1879).

that no title could be conferred by sale to purchasers from the State, were content to permit the continuance of the shadow which protected them from taxation, but did not threaten their possession. The evil was not only serious as it existed, but was constantly and rapidly increasing. It pressed itself upon the consideration of the legislature, and the result was the passage of the act approved March 1, 1875, commonly known as the Abatement Act."⁶⁰

Again, in a dissenting opinion in another case, this same judge used the following language:

"In this condition of things the legislature determined to deal with them as a separate and independent class, and for this purpose the act under consideration was passed. In my opinion it was intended to sell under the provisions of the act all the lands to which the State at that time held or claimed title, as shown by its rolls, regardless of any fact the existence of which would or would not invalidate its title. The State abandoned any claim, real or supposed, which it had to taxes for prior years. Whether the sales were valid or void, and whether if void they were void for one reason or another, whether taxes were really due for antecedent years or had all been paid, were by the very terms of the act rendered wholly immaterial. Neither taxes due nor titles arising in the past were the subject of consideration. The sole purpose was to sell those lands 'held or claimed by the State,' under previous sales for taxes for so much only as should be due for the year 1874. Though called an abatement act, that was not its chief end of design. Abatement of taxes was declared not to benefit the former owner, but to induce the public generally to invest in the lands by reducing the price at which they might be bought. It is true that the State assumed some taxes to be due, but whether any in fact were owing could only be determined by investigation of matters *in pais*, and no investigation of this character was provided for or could be made. The fact that no taxes were due for years other than 1874 did not, in my opinion, withdraw the lands so mistakenly assumed to be delinquent from the operation of the act. The rolls of land held or claimed by the State indicated, in my opinion, just what lands were intended to be dealt with, and are the sole and conclusive evidence of what lands were salable under the act."⁶¹

The foregoing extracts from the opinion of the Supreme Court of the State of Mississippi is probably the best statement of the conditions necessitating the Abatement Act, its purposes, and the general intent of the legislature in enacting it. As to the act itself, it has been called "a marvel of obscurity, composed of twenty-five sections, each of which is probably unequalled, save only by its fellows, in prolixity and confusion."⁶²

⁶⁰Cochran v. Baker, 60 Miss. 282, 288 (1882).

⁶¹Prophet v. Lundy, 63 Miss. 603, 608 (1886).

⁶²Cochran v. Baker, 60 Miss. 282, 289 (1882).

The Supreme Court says that "an examination of this act has impressed us with the conviction that what was the legislative will and intention as to the various detail of the act can never be known and scarcely approximated."⁶³ Fortunately the adoption of the code provisions as to the sale of the land frees that, the most important question, from all doubt.

It will be seen that while this law was passed as a special revenue act, it was not intended to collect delinquent taxes, but to get large bodies of land then exempt from taxation into a taxable condition. These lands were subjected by the act to certain taxes for the year 1874, and all tax collectors were required to proceed at once to the collection of these taxes. If these taxes were not paid on said lands by April 1, 1875, the lands should then become delinquent, and should be sold on the second Monday in May, 1875, for such taxes. It was probably not expected that such taxes would be paid. In short, the act virtually ordered that these lands be listed and sold for the taxes of 1874, such sale to vest a perfect title if not redeemed within twelve months. In accord with this intention millions of acres of land throughout the state were sold on May 10, 1875, and a few days immediately following. In some few instances small tracts were bought in by private parties, but the great body of these lands in default of bidders was forfeited to the state. However, the act was not a failure, because in twelve months' time the state's title would become perfected, thus enabling the state to convey good title.

The lands of the Liquidating Levee Board were to be subjected to the same abatement of taxes and the same listing and sale as State lands; that is to say, all the title of the State or Liquidating Levee Board to any land acquired by forfeiture for non payment of taxes for years prior to the year 1874, was released to the former owners as if no forfeiture or sale for taxes had ever been made, all previous taxes abated, and the land subjected anew as the property of its former owner to the payment of the taxes due. It was contended that this act would work the same advantage to the Liquidating Levee Board that it would to the state, that the act was conservative and constitutional. The lands of the Liquidating Levee Board were sold under this act on May 10, 1875, along with the state's land, and as directed by the act, in the absence of purchasers, conveyed to the state.

An act entitled "An Act to abolish the office of Liquidating Levee Commissioner, and to provide for the redemption of lands in the Liquidating Levee District, and for other purposes," became a law on April 11, 1876.⁶⁴ By the first section of this act the office of Liquidating Levee

⁶³*Ibid.*

⁶⁴Miss. Laws 1876, c. 105.

Commissioner was abolished; and by the second, third, fourth and fifth sections the books pertaining to said office were directed to be deposited with the Auditor and Treasurer of the state, and provision made for the transferring to said officers all property belonging to said levee district and for determining what claims against the district should be recognized and discharged by said officers. Section 6 provided for the redemption at any time prior to November 1, 1876, without damages, of the forfeited lands in liquidating levee bonds, scrip or surplusage certificates heretofore issued. Section 7 provided for the sale by the Auditor of these forfeited lands after November 1, 1876, and before January 1, 1878, on the same terms as are provided for redemptions in Section 6 of the act. Under these provisions redemptions and purchases were made without objection on the part of the bondholders, as their bonds and scrip were made receivable for State and county as well as levee taxes.

Section 8 provided that all deeds made by the "Auditor under the provisions of this act shall be *prima facie* evidence of paramount title, and no suit or action shall be brought in any court of this State to vacate or impeach any such deed, or to maintain any title or deed antagonistic thereto, unless the same shall be brought within one year next after the date of such deed, and after the expiration of one year after the date of such Auditor's deed the same shall be held and deemed by all the courts of this State to be conclusive evidence of paramount title, and upon which actions of ejectment and all possessory actions may be maintained." Section 13 provided that for all lands mentioned in this act not "redeemed or purchased as herein provided for, on or before January 1, 1878, no further time for redemption shall be allowed, and the title thereto shall be vested in the State of Mississippi, and no action in law or equity shall be maintained in any court of this State . . . for the recovery of any such lands," etc.

There is no doubt of the legislative will as expressed in this act. It was intended to accomplish what it was feared the Abatement Act had not done. That act was intended to place all these lands into hands that would pay revenue on them, but in default of bidders all of these lands had all practically forfeited to the State. As yet the courts had not passed upon the validity of the sales of these lands made under that act, and the legislature undertook with this act to perfect the State's title to these lands thus acquired. The State's shadow of title was to be made the actual title unless attacked within a certain time. We are told that:

"The evident plan and purpose was to permit the owners to redeem within a limited time and then to dispose of the land if unredeemed, to any purchaser who would accept the title which the State had previously acquired, fortified and protected by the operation of the eighth and thirteenth sections of the act."⁶⁵

⁶⁵Dingey v. Paxton, 60 Miss. 1038, 1053 (1883).

By expiration of time without regard to possession the legislature sought to transfer title from the owner and vest it in the State absolutely, thus securing to the State the title against all the attacks of the owner upon any grounds whatsoever. In this respect this act differed materially from the Abatement Act, for it will be remembered that that act attempted to release to the former owner all title of either the State or Liquidating Levee Board, and the State proceeded anew to subject the lands as the property of these former owners to the payment of the taxes due.⁶⁶

This act has a twofold operation: (1) it prescribes a short period of limitation, after which no suit shall be brought by the owner for the recovery of the property, and (2) it gives to the conveyances under the tax sales a conclusive effect as evidence, thereby cutting off all inquiry into the existence of defects or irregularities, and thus operates as a curative law. Its operation is first to divest from the owner the constructive possession of his property and to invest it in another, and in favor of the possession thus transferred to put in operation a statute of limitation for its ultimate and complete protection. A complete title to land, according to Blackstone, consists of the possession, the right of possession, and the right of property. It is evident that the effort of this statute is to do indirectly that which may not be directly done, namely, to divest title by a mere legislative decree.⁶⁷

By an act approved February 1, 1877,⁶⁸ the annual tax of five and three cents per acre, assessed by the Act of 1867, creating the Liquidating Levee Board, was reduced to one and one-half cents per acre. The outstanding bonds of the Liquidating Levee Board were directed to be called in and registered, and in lieu thereof new bonds at thirty-three and one-third per cent of the amount of the original bonds were directed to be issued, and said original bonds were required to be cancelled.

The above paragraphs give a brief summary of the legislative attacks upon the title of the Liquidating Levee Board. It was but natural that these new laws should soon bear fruit. Almost the immediate result of them was the case of *Green v. Gibbs*,⁶⁹ probably the most prominent case in the legislative and judicial history of the State. As this case is a final adjudication of almost this entire subject, it will be well to look into it somewhat in detail.

⁶⁶*Ibid.*

⁶⁷*Ibid.* [See Note (1941) 13 MISSISSIPPI LAW JOURNAL 535 which discusses the case of *Russell Investment Co. v. Russell*, 182 Miss. 385, 182 So. 102 (1938) in which there arose a problem similar to that in the *Dingey* case.]

⁶⁸Miss. Laws 1877, c. 5.

⁶⁹54 Miss. 592 (1877).

Early in the year 1877 Joshua Green, the holder of \$84,000 of the bonds of the Liquidating Levee Board, issued under the Acts of 1867 and 1871, filed a bill in the chancery court of the First District of Hinds County, in behalf of himself and other bondholders, against W. H. Gibbs, Auditor of Public Accounts, and W. L. Hemingway, State Treasurer, in their capacity as *ex officio* Liquidating Levee Commissioners, and against the State of Mississippi, alleging: (1) that the Act of 1867, having been accepted by the holders of claims against the General Levee Board of 1858, and the bonds having been issued under that act (Act of 1867) and the one of 1871, there was a contract which the State could not, by subsequent legislation, impair; (2) that the lands, which had been sold for the non-payment of taxes to the Liquidating Levee Board, were held in trust by them for the bondholders; (3) that the Abatement Act of 1875, in so far as it was intended to deal with those lands, and release back taxes, was unconstitutional and void; (4) that the Act of 1876, in so far as it imposed restrictions on the redemption of the lands, was unconstitutional and void, and (5) that the Act of 1877 was a direct attempt to repudiate two-thirds of the debt, and was void *in toto*. The bill then prayed: (1) that Gibbs and Hemingway, as *ex officio* Liquidating Levee Commissioners, be compelled to discover and set out by section township and range the lands held by them as such commissioners in the several counties of the Liquidating Levee District; (2) that the lands be decreed to be a trust fund, and sold to pay the complainant and such other bondholders as should come in and aid in prosecuting the suit; (3) that the taxes imposed by the Act of 1867 be collected; (4) for a receiver to make such collection, if necessary; (5) for an injunction, etc. To this bill Gibbs and Hemingway demurred on the following grounds; (1) that the acts attacked by the bill were constitutional; (2) that the acts under which complainants' debt accrued were unconstitutional; (3) that the allegations did not warrant the relief prayed; (4) that the court had no jurisdiction, and (5) want of equity on the face of the bill. This demurrer was overruled by the chancery court and an appeal was taken to the Supreme Court of the State.⁷⁰

On the appeal to the Supreme Court that court held:⁷¹ (1) that the Act of 1867⁷² became a contract between the State and the Liquidating Levee Board on the one hand, and the holders of the bonds on the other, which neither party could thereafter materially modify, without the other's consent; (2) that the lands forfeited to the Liquidating Levee Board constituted a fund for the redemption of the bonds issued by said board, which the legislature could not divert; (3) that the Act of 1877⁷³ repeal-

⁷⁰Gibbs v. Green, 54 Miss. 592 (1877).

⁷¹*Ibid.*

⁷²Miss. Laws 1867, c. 173.

⁷³Miss. Laws 1877, c. 5.

ing the tax and offering bondholders the alternative of surrendering their bonds and receiving new ones of one-third of their face value, with a less tax to pay them, or not participate in the new tax, was unconstitutional, and (4) that the fact that the Liquidating Levee Commissioners are vested by the act⁷⁴ with the power to sell the lands does not divest the chancery court of its inherent jurisdiction to administer the trust fund for the benefit of the *cestui que trust* on their application, and, in selling, the court may appoint the statutory trustee as its commissioner, as it may deem most advantageous to all concerned. The degree of the lower court, overruling the demurrer, was therefore affirmed and the cause remanded for answer.⁷⁵

On September 28, 1877, a decree was rendered in this cause by said chancery court ordering the defendants, Gibbs and Hemingway, Auditor and Treasurer, as *ex officio* Liquidating Levee Commissioners and *pro hac vice* commissioners of said court, to permit the former owners of the land included in the schedule, exhibited with their answer, to purchase, by way of redeeming the same, all of said land shown in said schedule, until December 1, 1877, after which time the said commissioners, until otherwise ordered by the court, should sell and dispose of all the lands undisposed of for such price and sum not less than all the liquidating levee taxes due and in arrears thereon, as in their discretion may be to the interest of the parties to the suit, taking in payment thereof currency or bonds or evidences of debt, included in said proceeding and exhibit in said cause. In pursuance to the decrees rendered in this cause W. H. Gibbs (and S. Gwin, his successor) as Auditor of Public Accounts, and W. L. Hemingway, as Treasurer, in their capacity as *ex officio* Liquidating Levee Commissioners and commissioners *pro hac vice* of said chancery court, in said cause, sold practically all of the lands which had formerly been sold to the General Levee Board of 1858 and the Liquidating Levee Board, which had not formerly been disposed of by said boards, and the sales made by them were properly confirmed by the chancery court.

Thus it is seen that the liquidating levee title not only held its own against repeated attempts on the part of the State Legislature to impair its strength, but came out with the sanction and confirmation of its sales by the chancery court, showing that equity had been done, adding strength to the liquidating levee title. This finishes the battle of the titles, leaving the liquidating levee title victor over all its enemies.

We pass now to the last division of our narrative, namely, the perfection of the liquidating levee title. It may seem needless after what has gone before to make any effort toward further perfecting this title; but

⁷⁴Miss. Laws 1876, c. 105.

⁷⁵Gibbs v. Green, 54 Miss. 592 (1877).

when it is remembered that there still existed outstanding paper titles, which at any time could call this title into question, bring its owner into court and subject him to the expense and trouble of a lawsuit, the wisdom of eliminating these adverse claims will be seen. Conflicts of title always detract from the salability of land, and thus hinder and retard the material development of the country. The lands of the Ten Cent Levee Board passed to the State under an Act of April 11, 1876.⁷⁶ By another act passed the same day the State became the successor of the Levee District Number One as to its land titles.⁷⁷ Thus the State had become the adverse claimant of the liquidating levee title both by virtue of these acts as well as by direct forfeitures to the State. So, on March 14, 1884, the legislature passed an act⁷⁸ directing the Auditor of the State to execute a quit claim deed to all purchasers of lands in the liquidating levee district of any interest claimed by the State in any lands which had been sold by the chancery court under the decree of the case of *Green v. Gibbs*, upon payment of such levee taxes as had accrued prior to the year 1883. If the legislature could not perfect the title to these lands by confiscating the liquidating levee title, it would perfect it so far as the State's title was concerned by conveying whatever title the State had to the holders of the liquidating levee title. The Act of 1884 was intended to accomplish this end. The Supreme Court held in construing this statute that the Auditor had no authority to convey the title claimed by the State, except upon the condition that the grantee had paid the taxes referred to in the act, and since in many instances it was uncertain what amounts were due, the conveyances made under the act were of doubtful validity.⁷⁹ To remedy this defect in the Act of 1884, the legislature, on March 2, 1888, passed an act⁸⁰ to quiet and settle the title to certain land in the Yazoo Delta which was sold by the commissioners of the Chancery Court of the First District of Hinds County, in the case of *Green v. Gibbs*. The preamble of this act recites that sales of large bodies of lands had been made under the *Green v. Gibbs* decree, and that by reason of the lapse of time, the destruction of records and the loss of original tax collectors' deeds, it had become difficult in many instances for the purchasers of said lands to establish title of the Liquidating Levee Board; that the development and settlement of that portion of the State was much retarded by the unsettled condition of land titles, and that the public interest would be promoted by legislation which would make them secure.

The first section of this Act of 1888 made the deed executed by said commissioners under said decree *prima facie* evidence of the regularity and

⁷⁶Miss. Laws 1876, c. 105.

⁷⁷Miss. Laws 1876, c. 108.

⁷⁸Miss. Laws 1884, c. 104.

⁷⁹Murdock v. Chaffe, 67 Miss. 740, 7 So. 519 (1890).

⁸⁰Miss. Laws 1888, c. 23.

validity of said chancery court proceedings, and of the authority of said commissioners to sell, and *prima facie* evidence that the land embraced was duly and legally sold to the Board of Levee Commissioners up to and including the sale of 1874, and that the titles conferred by said deeds were to all intents and purposes valid. This section has been passed on by the Supreme Court of the State and upheld, the court holding, however, that the statute does not relieve a person holding under a deed by Gwin and Hemingway, which does not show when or by what particular sale the title to the land was acquired by the Liquidating Levee Board from proving the particular title by which the levee board claimed.⁸¹

The second section of this Act of 1888 authorized the Auditor to execute deeds to purchasers from Gwin and Hemingway, commissioners, etc., conveying the State's title to the land purchased, and was somewhat similar to the Act of 1884, already referred to. The third section of this act made the deed executed by the Auditor, in pursuance to Section 2, *prima facie* evidence of paramount title. The Supreme Court in construing these sections have held that the Auditor's deed to purchasers of levee lands, though declared to be evidence of paramount title, did not operate to absolve such purchaser from pointing out the particular title by which the State claimed.⁸² The fourth section prescribed twelve months as the period of limitation in which suits might be brought to recover land conveyed by said commissioners' deeds or by Auditor's deeds. The fifth section was an attempt to validate the sales made to the Liquidating Levee Board providing "that all sales of land lying in the district subject to the liquidating levee tax, heretofore made for said tax shall be, and are hereby declared to be, valid, * * * and shall not be impeached for any cause, except that the tax for which said land was sold has been paid."

It has been seen that it was the purpose of the Legislature by the Acts of 1884 and 1888, above referred to, to vest in the purchasers and their vendees the title of the State to the land sold under the decree in the case of *Green v. Gibbs*. To further effectuate this purpose the following laws have been subsequently enacted: Chapter 77, Laws 1894; Chapter 162, Laws 1896; and Chapter 86, Laws 1902. All of these statutes are of the same general tenor, having for their end the quieting and perfecting of the titles of the lands in the Yazoo-Mississippi Delta.

What title did the Auditor convey by his deeds? In many instances there had been repeated forfeitures of the same land to the State. Some

⁸¹*Patterson v. Durfey*, 68 Miss. 779, 9 So. 354 (1891) [overruled as to another point by *Hoskins v. Illinois Cent. R. R.*, 78 Miss. 768, 29 So. 518 (1901)]; *Sunflower Land & Mfg. Co. v. Watts*, 77 Miss. 56, 25 So. 863 (1899).

⁸²*Nat. Bank of the Republic v. Louisville, N. O. & F. Ry.*, 72 Miss. 447, 17 So. 7 (1894).

of these tax sales to the State were void, some were valid. On this point the Supreme Court has held that a deed from the Auditor to land acquired by the State at a sale for taxes passes to the purchaser such title as the State has; and if, at the time of the execution of the deed, the State holds a title acquired at any sale, it passes to the purchaser, notwithstanding that the deed may recite that the land was sold to the State on a day of sale different from that on which the title was really acquired, and when the sale was in fact void and passed no title.⁸³ Again this court, in construing this statute, said: "The intent of the Legislature was to convey whatever interest the State might have in any of the lands, without regard to the source from which the claim of title by the State might have been derived."⁸⁴

The effect of these remedial acts and the decisions of the Supreme Court construing them is to pass title absolutely into those purchasing both from the levee commissioners and from the Auditor. If there was any defect in the liquidating levee title to any of its lands that was not cured by lapse of time under the Act of 1860, then all such land was clearly salable under the Abatement Act of 1875. All such lands were in fact actually sold under the Abatement Act, and in default of bidders struck off to the State. The title to these lands thus acquired by the State passed to purchasers by the deeds made by the Auditor under the Act of 1888. The Supreme Court has expressly ruled upon this point, holding that where lands had forfeited both to the State and to the Liquidating Levee Board, it is immaterial which of these two has title; a purchaser from the State under the Acts of 1884 and 1888, above referred to, and from Green and Hemingway under the *Green v. Gibbs* decree, divests any title that the former delinquent owner may have had, and acquires a perfect title.⁸⁵

Few instances might arise where those under disability claiming under delinquent owners would not be barred by limitation. All questions of infant owners have been closed out by lapse of time. If purchase some lunatic was owner of some of these lands at the date of the original tax sales, and is yet alive, or the right of redemption has been recently cast upon others by his death, there would still exist in such cases a valid claim in the nature of a right of redemption. But this right would carry with it the obligation to pay accumulated taxes, which would probably equal the value of the land. Besides, the instances in which lunatics were the holders of land must be rare.

⁸³*Caruthers v. McLaran*, 56 Miss. 371 (1879); *Gamble v. Witty*, 55 Miss. 26 (1877); *Paxton v. Valley Land Co.*, 68 Miss. 739, 10 So. 77 (1891); *Louisville, N. O. & F. Ry. v. Buford*, 73 Miss. 494, 19 So. 584 (1895).

⁸⁴*Means v. Haley*, 86 Miss. 557, 38 So. 506 (1905).

⁸⁵*Paxton v. Valley Land Co.*, 68 Miss. 739, 10 So. 77 (1891).

From the foregoing it will be seen that all titles to the lands of the Liquidating Levee Board have been concentrated into one title, with the single exception of the paper title of the delinquent owners, founded on patents from the government. This old title of the delinquent owners, as we have already seen, is practically worthless. Its owners are in many instances dead, and their descendants will probably never know of it. It has seldom of late years been asserted, and invariably repudiated by the courts when so asserted.

No other section of the country has had greater difficulties to overcome than the Delta, and by no means the least of these difficulties has been the perfection of the titles to the lands. Probably no other country ever witnessed such a condition of land titles, yet this barrier has been slowly but effectually removed. It is exceedingly interesting to recount the entanglement of title, and as delightful to see the triumph of stability and simplicity of title. The jungles of the Delta's luxuriant wild woods seemed hardly less impenetrable, but as these wild jungles are every year becoming more and more the prolific mother of the fruits of labor, just so have tangled titles been converted into those of stability and trust. What the strength and industry of the muscle is now doing in turning the wildest woods into the most fertile fields, the invention and the ingenuity of the legislative mind have already done in the perfection of the titles. Both conquests have been and will be made, be it said to the credit of our people, as a result of their honest toil without the repudiation or even shirking of a single obligation.

⁸⁶The original article at this point sets out the history of title to the original Delta and Pine Land Company holdings. This portion of the article is omitted here.

BIOGRAPHICAL SKETCHES

THE HUMOR OF JOHN SHARP WILLIAMS

*George C. Osborn**

The average person is surprised to learn that humor is an important characteristic in American political life. It often enters the highest positions of our national government and definitely influences men and measures. As a rule, popular leaders are careful not to become known as humorists, because to do so tends to make the public discount their statesmanship. John Sharp Williams often resorted to ridicule and sarcasm, apparently without thought of consequences. Perhaps he did so too frequently, and as a result he sometimes suffered a lack of serious consideration that should have been his.¹ One of his congressional colleagues thought of Williams as "an amusin' cuss" on all occasions, always flippant, always funny, and charged with no responsibility but devilment.² While doubtless many people remember Williams as the statesman, others prefer to recall Williams as the matchless story teller.³

Long after Williams became a member of the House of Representatives he told his colleagues about his initiation at his first Congress. He had brought with him a letter of introduction to "Old Dave" Culberson, Representative from Texas. When he was not obtaining guidance from Old Dave he was discovering something to emblazon his name high upon the roll of fame. Sometime during the session there appeared a small appropriation bill which Williams thought should be defeated.

"Judge, isn't this an iniquitous measure?" he asked Culberson.

"I reckon it is, John," he answered in his Lone Star drawl.

"Well, wasn't it reported from some committee?"

"Yes, John, I reckon it must have been, these things usually are."

"Do you know who was on that committee, Mr. Culberson?"

"Yes, John, if I remember rightly, I was on that committee."

"Couldn't you have beaten it there, Mr. Culberson?"

*Professor of History, Bob Jones College, Cleveland, Tenn.; A.B., 1927, Mississippi College; M.A., 1932, Ph.D., 1938, Indiana Univ.

¹This is the writer's conclusion after having read 25,000 letters concerning Williams contained in the Williams Papers in the Manuscript Division of the Library of Congress and at Cedar Grove Plantation, Benton, Mississippi, in addition to the *Congressional Record*, current newspapers, periodicals, etc.

²Charles S. Grosvenor of Ohio, 58 CONG. REC. 3635.

³WILSON, MY MEMOIR (1939) 105, in which the author speaks of "the inimitable Williams" as a story teller.

"Well, John, I would have found it very difficult."

"Is there any way we can defeat it now, Mr. Culberson?"

"Oh! yes, John, you can defeat it by a point of order."

That was enough for the budding statesman from Yazoo County. He leaped into the aisle with index finger upraised and with a full consciousness that the destiny of the Republic rested on his shoulders.

"A point of order, Mr. Speaker," he yelled.

When the Speaker banged his gavel the proceedings of the House came to an abrupt halt. All the members looked at Williams with interest and wonder as the Chair inquired:

"What is the gentleman's point of order?"

"Then it flashed over me," recalled Williams, "that I didn't know what a point of order was. I turned to ask my guide, my philosopher, and my friend. He wasn't in his seat. I looked down the aisle and caught a glimpse of his shaking shoulders disappearing into the cloakroom."

"If I hadn't had a sense of humor, I would have been left up in the air in the most ridiculous position ever seen in the House. As it was, the position was ridiculous enough. I had enough sense of humor to see how I had been done and turned around and said:

"Mr. Speaker, on further reflection, I will withdraw my point of order."⁴

During Williams' public career of nearly thirty years the tariff issue was of paramount importance. He, as did many others, talked long and frequently against protectionism. To Williams the Republican claim that American prosperity was due to the protective tariff was like the farmer who started to town carrying eggs to market. The man had two baskets, one containing eggs and the other a large number of affidavits to the effect that the eggs were fresh and sound. As a result the eggs obtained poor sale because there were too many affidavits.⁵

Williams firmly believed that the duties under the Dingley Tariff Act were so high that an ordinarily unprofitable industry could be created in the United States. For example, if a tax of one dollar a piece was put on bananas and maintained for a few years, a "Great American Banana Industry" would flourish.

⁴N. Y. Times, Dec. 12, 1905; Feb. 7, 1909.

⁵55 CONG. REC. 1061.

"If I continued that system of taxation for twenty years . . . there would have come . . . a new generation that 'knew not Joseph' nor cheap bananas; and the moment sensible people came into power with the idea of revising the banana schedule these gentlemen who 'knew not Joseph' and had gone into the American banana business and perhaps formed a banana trust would come into the committee rooms of the National Legislature . . . giving utterance to cries of unutterable woe: 'Are you going to strike down the Great American Banana Industry; are you going to reduce the duty from a dollar a piece on bananas to 80 cents? We can't stand it. It will ruin us. Are you going to make the people engaged in banana raising go to the soup houses? Are you going to discriminate in favor of tropical sunshine against self-respecting American hothouse laborers?'"

With a custom duty of \$1.00 each on bananas the American consumer, Williams estimated, would be paying about ninety cents a piece for his bananas. "After fifteen or twenty years 'home competition' would have reduced the price in the American market, let us say, to forty cents a piece, and then Republican orators and politicians would say privately, in newspapers, and on the stump and within these walls . . . 'Lo, and behold! see how a protective tariff has reduced the price of bananas from 90 cents apiece in 1950 to 40 cents a piece in 1965. . . .'"

"Yes! reduction from superlative extortion to comparative extortion!

"But in all this picture keep in mind one thing; while protectionism lasted bananas would never reach three for a nickel, because if they did, that public enemy—tropical sunshine—would be master."⁶

Before the congressional elections in 1906 Williams clamored for tariff reform but the Republicans by their inactivity reminded him of a little jingle which he had heard from one of his children.

"When I asked my girl to marry me, she said,
'Go to Father.'
She knew that I knew that her father was dead;
She knew that I knew what a life he had led;
She knew that I knew what she meant when she said,
'Go to Father.'"⁷

On one occasion Williams' sarcasm brought down on his head a storm of protest from many people in the country who thought he had been sacriligious.⁸ During the campaign of 1912 he gave a parody on the Apostle's Creed which he entitled the "Creed of the Church of Latter

⁶58 CONG. REC. 381.

⁷60 CONG. REC. 4355.

⁸See letters in Williams Papers, Cedar Grove Plantation, Benton, Mississippi; also Washington Post, Apr. 25, 1912.

Day Saints according to the Gospel of Saint Theodore." Although the Creed was stricken from the *Congressional Record* at the request of its author, a copy of it was found in the attic at Cedar Grove.

Roosevelt's Creed

"I believe in Theodore Roosevelt, maker of noise and strife and in Ambition, his only Creed (My Lord). He was born of the love of power and suffered under William Taft; was crucified, dead and buried. He descended into Africa. The third year he rose again from the jungle and ascended into favor and sitteth on the right hand of his party, whence he shall come to scourge the licked and the dead.

I believe in the Holy Outlook, the Big Stick, the Ananias Club, the forgiveness of political activities, the resurrection of Presidential Ambitions and the Third Term Everlasting.

Amen. Amen. Amen."⁹

Williams contended, unconvincingly for some, that he was "not mocking God but Roosevelt."

When the Democrats came into power under Wilson and adopted the customary majority parliamentary tactics, the Republican protests reminded Williams of a story. A woman in Greenwood, Mississippi, had company unexpectedly and sent her husband out to get Aunt Martha, the cook. He found old Aunt Martha on the street with a brickbat in her hand indulging in some rather extreme language.

" 'Aunt Martha, what is the matter?' he said.

"She replied, 'Well, some poor white trash just come along here with one of them new machines that runs without any horses and come mighty near running over me. If I could have got this brickbat in time I would have stove in his brains.'

" 'Well, your mistress wants you to come, and to come rapidly; you must help her out; she wants you to come in five or six minutes.'

" 'How do you expect me to get way out there in five or six minutes,' Aunt Martha inquired.

"He said, 'I will carry you out in my auto.' He put her in. The old darky looked a little out of place at first, but then surrendered herself to the luxurious cushions. Soon a Negro man crossed the road very slowly. Aunt Martha yelled, 'Run right on. He has no business crossing the road in front of our car, anyhow.'"¹⁰

⁹This must have been read in the Senate on April 25, 1912, see 62 CONG. REC. 5328.

¹⁰63 CONG. REC. 902.

During the World War, Williams was a most ardent champion of the administration and resented all attempts at legislative interference. Speeches were made in the senate opposing the draft law months after it had been put into operation. Williams spoke for more than an hour in answer to Senator Thomas W. Hardwick of Georgia, who made such a speech. Williams said that if any man would not fight for his country under the provocation the United States had received, he would not fight "if a man came into his house and slapped his wife's jaws." The Mississippian apparently was angry, but he immediately lapsed into his saving sense of humor. The Senator from Georgia had boasted of his pro-Americanism. Hardwick may have been pro-American, but as "a fellow stated to the naked man who was boasting about his devotion to the cause of decency, 'you have a poor way of showing it.'"¹¹

When Congress was debating the possibility of creating a congressional committee to assist Wilson in expending the vast amount of money which was being appropriated, Williams "would not hear of it for one moment" and said that "it would be better to call that damn fool committee . . . 'the committee on the criticism of the President.'"¹² Later he wrote Wilson that he personally held membership in the "Grand Army of Framers of Presidential Conduct."¹³ As a substitute for the defeated congressional committee plan, Senator George E. Chamberlain moved to create a bipartisan war cabinet. Williams explained Chamberlain's fear about the President's possible misuse of his powers in characteristic style. It reminded him of an old story about a man who heard a rattling of some sort and went to the closet door instead of the back door, "and forgetting that he himself left some limburger cheese in the closet the night before, exclaimed: 'Great God! It looks like a hurricane is coming. Everything is dark as hell and smells like cheese!'"¹⁴

Criticism of the president was especially severe during the congressional election of 1918. The boys in Washington were playing politics while the boys in France were fighting Germans. Williams read to the senate a cablegram which he had just received from the front in France. It was in his own private cipher, unknown to the Germans, the Allies, and the President: "Most critical day of this long hard battle. Withstood attacks of the Teutons here with comparative satisfaction. Huns attacked with infantry, cavalry, heavy and light artillery, aeroplanes and gas. Had to give way a bit but are not downhearted. Rumor of attack on Wash-

¹¹65 CONG. REC. 6742-6744.

¹²John Sharp Williams to J. Sloat Fasset, July 31, 1917, in Williams Papers, Manuscripts Division, Library of Congress. Unless otherwise stated Williams Papers will refer to this collection.

¹³Williams to Woodrow Wilson, Nov. 27, 1918, in Williams Papers.

¹⁴Williams to Samuel S. Mehard, Jan. 29, 1918, in Williams Papers.

ington. How about it?" To which the Senator said he replied: "Purely a gas attack—poisonous, of course, if it had got us. Enemy was carefully prepared; were in a measure taken unaware; most of us not present; but, in the providence of God, the wind shifted and the enemy was stifled."¹⁵

Talk about hyphenated Americans aroused Williams' ire. In one respect he was like the Kaiser. Richard Bartholdt, congressman from Missouri, on one of his trips to his native country had sent his card to Wilhelm II requesting an interview. On the card the congressman wrote, "A German-American." The Kaiser replied, "I know what a German is, I know what an American is, but I do not know what a German-American is."¹⁶ The Senator expressed himself more forcefully to a colleague when he said: "Damn a man that has got to be some particular sort of American instead of simply an American."¹⁷

After making a fiery speech in the senate against Americans who coupled the name of any other country with America, Williams walked from the Capitol to the Senate Office Building with his Republican friend, Jim Watson. The Indiana Senator remonstrated with the Mississippian "because he imbibed so much and asked him why he did not take a couple of good 'snorts' and quit as do nearly all drinkers?" John Sharp stopped on the sidewalk, turned and faced his large, would-be moral reformer, and said: "Jim, I do not allow men to talk to me about my personal habits because they are my own business and nobody has a right to interfere. But you and I have been friends so long a time, and then you are such a damned good natured fool anyhow, that I will answer you. One time I made up my mind that I would never take another drink, that I would quit forever. I abstained absolutely for six months, and I tell you the honest truth, Jim, when I say that in all that six months I never had an original thought."¹⁸

When the Versailles Treaty was before the Senate, Williams spoke long and heatedly. He was disgusted, especially by those who argued that they were most eager for world peace but who fought the League. In 1921 at a meeting of the Trustees of the Carnegie Endowment for International Peace he summed up his opinion by saying that they reminded him of a story told by General Jubal Early at the second battle of Bull Run. As the battle was about to begin and General Early was riding up toward the lines, he passed a chaplain making for the rear as rapidly as possible. General Early stopped and said to the chaplain: "Where are you going?"

¹⁵65 CONG. REC. 4133.

¹⁶Williams to George S. Viereck, July 9, 1919, in Williams Papers.

¹⁷Williams to William H. King, Feb. 11, 1918, in Williams Papers.

¹⁸WATSON, AS I KNEW THEM (1936) 288-289.

"The chaplain replied, 'I am going back where it is safer.'

" 'Turn around and go back to the front,' said General Early. 'Aren't you ashamed of yourself? For years you have been praying for a chance to see Almighty God face to face and here at the first chance you really get, I find you running away.' "¹⁹

Of all the debates on post war problems in which Williams engaged perhaps none drew from him the fire that the pension question kindled. He recalled how his Grandmother Sharp had haughtily told the federal agent who informed her that she was entitled to a pension as the widow of a Mexican War veteran: "I'll have you to understand, sir, that Captain Sharp did not fight for money."²⁰ One of Williams' most classic stories forecasted the pension problem. A man living in Shreveport, Louisiana, went down to Bayou Le Fourche fishing. He slipped, fell overboard and was nearly drowned. A man came up in a boat, rolled him over, and revived him. Later the man from Shreveport said: "My friend, you have saved my life. There is nothing I can do for you, at any time, I am not willing to do. My name is so and so, and I live in Shreveport. What is your name?"

"Jean Lebon. . . I live here. I have a farm here, and my horse and my cow. I do not need anything from anybody."

Several months later as the man saved from drowning went down the streets of Shreveport, he met Jean Lebon. He stepped over with both hands extended, rejoiced from the very center of his heart to see Jean Lebon, and said, "Now, Mr. Lebon, I am glad you are in Shreveport. My house is open to you. Is there something I can do for you?"

Jean Lebon took off his hat and looked at it. "Oh!" he said, "I don't know, I don't know."

The man whom he had saved said, "A hat! A hat! Let's go and get you a nice hat." So he went and bought Lebon a hat and some dinner and some wine. The next day he found Lebon on the street again.

"Mr. Lebon, I thought you told me yesterday you were going home?"

"Well I was but after that fine dinner with you I felt sort of lazy so I stayed over until this morning and . . . said to myself, 'I might meet my friend again.' "

"Well I am glad you stayed. Now is there something I can do for you?"

¹⁹BUTLER, ACROSS THE BUSY YEARS (1939) 343.

²⁰67 CONG. REC. 9020-9023.

"Well, I don't know," said Lebon and stuck out his foot.

He got a pair of boots. He needed a suit and got it. A few months later he was back and the thing started all over again. Finally, the Shreveport man said to him: "Now, Mr. Lebon, I owe you my life; I owe you all that I am and all that I possess. I am willing to give you everything I have except just enough for my wife and children to live on. I want to ask one favor of you, Mr. Lebon. If I ever come into that dadblamed country of yours again and fall into one of those black bayous and am about to drown and you see it, for God's sake and my sake let me drown. That is my sole request of you." Williams urged the American Legion "for God's sake and the American treasury's sake" to let the country sink the next time it was endangered.²¹

In fact, Williams had often been a self appointed watchdog of the treasury and sought to curb what he thought useless or unwise expenditures. For instance, he gloried in the erection of the new Senate Office Building. He could not see, however, the necessity of continuing to rent offices elsewhere for storing the senators' documents and books. The explanation that these articles were dirty and unhealthful brought the retort from Williams: "If books had been unhealthful and insanitary this country would have ceased to enjoy the benefit of my constructive statesmanship many and many a year ago."²² He scoffed at the fact that about half of one floor of the Senate Office Building was filled with utterly useless bath arrangements. "It is as foolish," continued Williams, "as a man's going down into a pasture with a red flag and flaunting it at a bull. . . . You can go through the pasture just as well without the flag. . . . It does not keep the rain off you; it does not keep the sun off you; it does not do any good; and it makes a bad impression on the bull."²³

Perhaps, Williams' irritation over the Senatorial bath arrangements was not based solely on his concern about their impression on public opinion as he had visited these rooms. He passed through the frosted glass doors leading into the inner temple where great men prostrated themselves and were scrubbed. The Mississippian was stripped of his raiment and put through one weird ablution and ordeal after another. The attendants "electric lighted him, steamed him, parboiled him, prodding him from time to time to see if he were done, manipulated him, scoured him, and played doleful pieces on him with their bare hands as if he were an xylophone." Finally when the senator was laid on a marble slab for the salt rubdown he entirely lost his temper. He pulled himself up and roared: "It may be

²¹67 CONG. REC. 9020-9023.

²²62 CONG. REC. 7549.

²³62 CONG. REC. 7549.

that I haven't taken as many baths in the course of my life as I should. But I'll be eternally goldarned if anybody can make me believe that I'm so hopelessly dirty that I've got to lie here and be scoured with sand."²⁴

Some of Williams' best stories resulted from his apt portrayal of men and events. Senator William E. Borah's tendency to pick flaws in almost any argument suggested to Williams an anecdote: A man was walking down the street in Louisville, Kentucky, when he noticed a stranger in front of him monopolizing the sidewalk. As he overtook him he heard the stranger mumble: "I'm going home to lunch. If lunch ain't ready, I'm going to raise Cain; and if lunch is ready, I won't eat a dad-blamed bite of it." Borah interrupted Williams at this point, and the latter turned to him saying: "If there is any point in the world where it is inappropriate to interrupt a man, it is when he is in the midst of an anecdote." In vain did Borah request that Williams tell the story the way he had previously related it in the senate cloakroom.²⁵

Often, when he began to speak, Williams walked over to the Republican side of the senate, turned, and faced his political adversaries. Senator James E. Watson once asked him: "Williams, why in the hell do you always come over on this side to speak?" Quick as a flash came back the retort: "I have got to be a missionary to you damn political heathen."²⁶

On another occasion the Mississippian waddled over to Watson's desk and drawled: "Jim, [Boies] Penrose is dead, my pair is gone, and I've got to get another one. I don't want any confounded mugwump for my pair. I want just as much of a reactionary as I can find. I want a man who for thirty years, by neither direction nor indirection, has ever been right on any public question, and by golly, you're my man!"²⁷ They remained paired the rest of Williams' senatorial career.

Williams was "not only a Democrat with a big 'D' but a democrat with a little bit of a 'd.'" Among his friends he counted "ditch diggers and millionaires."²⁸ As a Democratic senator he wrote President-elect Warren G. Harding: "I came near wiring you: 'Reluctant congratulations; remember Bordeaux,' but I thought it would be better to wait to hear from Toomsaba, Schuqualak, Buccatuna, Sookarnochie, and Yio-geoghanghenny. The Democratic majorities in those places, however, are not large enough to overcome your vote in other precincts like New York, Pennsylvania, and Ohio, hence I find myself forced into labored and insincere congratulations and some advice.

²⁴Jackson Daily News, Oct. 10, 1913.

²⁵63 CONG. REC. 201.

²⁶Interview with former Senator James E. Watson on Aug. 5, 1937.

²⁷WATSON, AS I KNEW THEM (1936) 295.

²⁸65 CONG. REC. 10981.

"The advice is to make me animal tamer—you will need one."²⁹

As a firm believer in democracy with a little "d," Williams played the leading role in a most amusing debate. During his tenure in the house there was an attempt to have the name of Sixteenth Street changed to the Avenue of the Presidents. He held such efforts in check, but during the two years Williams was absent from Washington, the change was effected. When he returned to Washington, he was living on the Avenue of the Presidents. In a speech which was generally credited with restoring the original name to the street, Williams stated that the chief influence in securing the change was society which he spelled "with a 'S-A-S' and a 'S-I-E' and a 'T-Y.'" The Avenue of the Presidents would come in so nicely on a social calling card. If there were to be an Avenue of the Presidents, there should be an "Avenue of the Vice Presidents," and an "Avenue of the Cabinet," and by all means an "Avenue of the Senators." Senator Charles S. Thomas agreed with Williams and wished to introduce a resolution that Fifteenth Street be changed to the "Alley of the Vice Presidents." Williams added that for the sake of brevity let the Senator from Colorado strike out the word "Presidents." He concluded by urging those "who loved high thinking and plain living," to accept his resolution.³⁰

Not long before he left the senate, Williams had a very heated argument with Senator Thomas Heflin. Heflin had recently delivered an outdoor speech and had been interrupted by airplanes flying overhead. He returned to the senate and introduced a resolution to prevent airplanes from disturbing public assemblies in the District of Columbia. When Williams objected to the Alabamian's request for unanimous consent, the debate was on. Williams contended that nothing was free but the air. Trusts and monopolies owned the earth, the Republican tariff mongers controlled the United States, and French militaristic instinct dominated Europe. He pled that the air be left free for God, His angels, and airplanes, even if the Senator from Alabama was interrupted while speaking. "Why," continued Williams, "should anybody quarrel with anything which makes a noise in competition with a Senator making a noise? They are both equally noisy and between the two the airplane is the more scientific noise."³¹ Most of this debate was stricken from the *Congressional Record* because of its unparliamentary content. Each of these gentlemen thought he had the better of his antagonist. Heflin told a friend that he was sorry he had bested Williams, while the latter went home and told his wife: "I sort of lost my sense of proportion today and ridiculed Tom

²⁹Williams to Warren G. Harding, Nov. 8, 1920, in Williams Papers.

³⁰63 CONG. REC. 4738-4741.

³¹67 CONG. REC. 8578-8580.

Heflin and set all of the Senate and galleries laughing at him. I am sorry I did it."³²

When Williams retired from the senate in March, 1923, he was tired and disillusioned about politics. He said the senate reminded him of a mule which was described by one of his Negro tenants: "Boss, dat am sho'ly a powerful fine mule, but he suttinly do make the mostest sideways motions and travels fu'ther 'thout gittin' no place en any mule I ever seed."³³ Williams wrote one of his friends that after his retirement he was "afraid the American Republic might not be able to totter along and might sink down like an old imbicile . . . but when I reflect that George Washington and 'Thomas Jefferson have passed on and the blamed old thing kept on going, I gather a fresh hold on my natural optimism and hope for the best."³⁴

³²Williams to Gerrard Harris, Sept. 22, 1922, in Williams Papers.

³³Jackson Daily News, Jan. 21, 1923.

³⁴Williams to W. H. Echols, Jan. 17, 1923, in Williams Papers.

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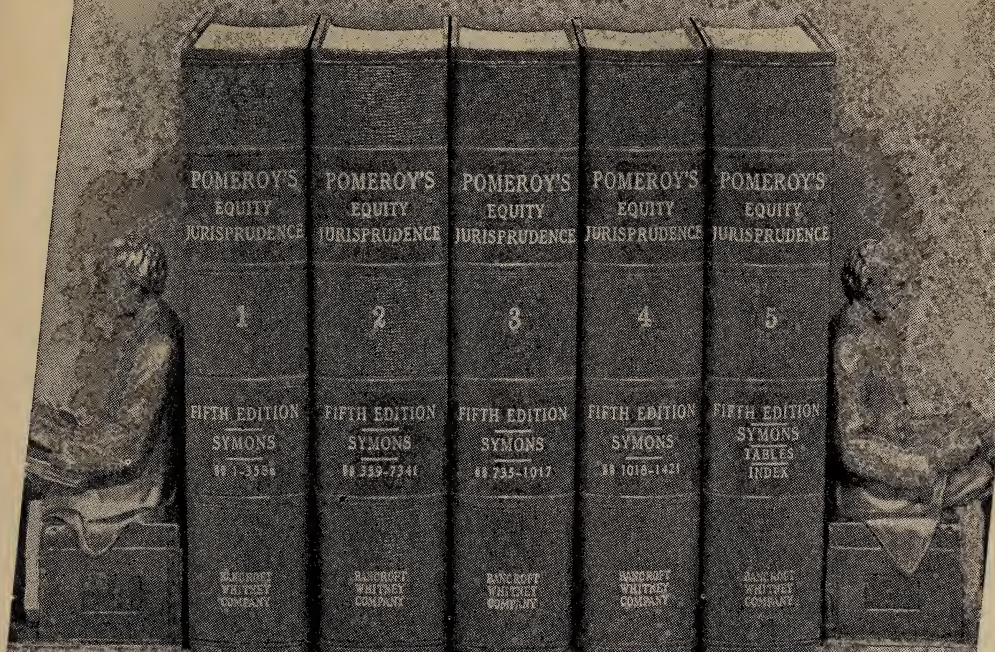
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